Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

ORAZIO STANTINI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether it Is Constitutional Error to Sentence a Defendant under a Federal Sentencing Guideline for First Degree Premeditated Murder Where the Indictment Charged Second Degree, Non-premeditated Murder and the Jury Was Instructed Only to Consider Second Degree Murder and Not to Consider Premeditation and it Violates the Rule Established in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) for a Circuit Court to Deny a Certificate of Appealability Where the Defendant under 28 U.S.C. §2255 Has Raised this and Other Significant Constitutional Issues over Which There Is a Direct Split of Authority among the Circuits and Within the Reviewing Circuit Itself?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Robert Bisaccia was the only other party before the trial court and the court of appeals in this case.

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OPINIONS BELOW

The decision of the court of appeals denying Mr. Stantini's application for a Certificate of Appealability ("COA") was a one page summary order without any analysis (A-1-A-2). The decision from the district court denying the application for a COA is reported at *Stantini v. US*, 268 F. Supp. 2d 168 (E.D.N.Y. 2003)(A-3-A-38) and an additional decision from the district court relevant to the issues raised herein is reported at *Stantini v. US*, 2000 U.S. LEXIS App. 7231 (E.D.N.Y., April 12, 2003)(A-39-A-82).[1]

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision denying Mr. Stantini's application for a COA in this case on February 11, 2004. Mr. Stantini filed a motion for an extension of time for the filing of this Petition and this Court extended the time to file this petition until July 12, 2004.[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)[3] and this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides, in relevant part, "No person shall be held to answer for a capital, or other infamous crime, unless on a

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[1]Mr. Stantini's case in the district court was consolidated with the §2255 petition filed by his co-defendant, Robert Bisaccia. Mr. Bisaccia is filing his own petition for a writ of *certiorari*. Mr. Stantini joins in that petition to the extent the same applies to him and is not inconsistent with the arguments herein advanced.

[2]Mr. Stantini filed a second motion for an extension of time following the release by this Court of its decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573 (June 24, 2004), in order to file a motion in the Second Circuit requesting a recall of the mandate for a consideration of the impact of that directly relevant decision; however, the motion was returned because the rules prohibit an extension of time beyond 60 days.

[3]*See also Hohn v. US*, 524 U.S. 236 (1998).

presentment or indictment of a Grand Jury *** nor shall any person *** be deprived of life, liberty, or property, without due process of law ***."

Amendment VI to the Constitution of the United States provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *** and to be informed of the nature and cause of the accusation; *** and to have the Assistance of Counsel for his defense."

Article I, Section 9(3) of the Constitution of the United States provides, in relevant part, "No *** ex post facto Law shall be passed."

STATEMENT OF THE CASE

A. Procedural History

On November 26, 1993, a jury in the Eastern District of New York returned a verdict of guilty against Mr. Orazio Stantini of having a role in a racketeering conspiracy to commit murder and the 1988 murder of Francesco Oliveri. On April 18, 1995, a motion for a new trial and to set aside the conviction was denied and on June 15, 1995, Mr. Stantini was sentenced to 27 years in prison. On May 24, 1996, his judgment of conviction and sentence was affirmed by the United States Court of Appeals for the Second Circuit.

On June 20, 1997, Mr. Stantini filed a *pro se* motion to vacate his judgment of conviction and sentence pursuant to 28 U.S.C. §2255. On December 11, 1997, the district court entered an order erroneously dismissing Mr. Stantini's §2255 motion. On March 5, 1998, the Second Circuit reversed his decision, remanding the case for litigation of the §2255 motion. On remand, the undersigned entered the case as counsel for Mr. Stantini and advised the Court that the *pro se* filing had to be amended, that new information had been developed through an in depth investigation, and the undersigned requested an opportunity to file additional pleadings setting out fully the claims for relief. The undersigned also filed a motion for recusal, noting evidence that required the recusal of the district judge, based on his

previously undisclosed involvement in plea negotiations with the government's sole witness against Mr. Stantini, the court's further involvement with that witness, and the court's personal and undisclosed knowledge of the conflicts of interests under which trial and appellate counsel had been operating. The district court was asked to rule on the recusal motion and permit a review of any adverse ruling on recusal through Mandamus before any further action was taken in the case. The district judge ignored these requests and, without further notice and with only some of the issues having been raised and developed, after sitting on the case without action for two years, entered an order on April 12, 2000, denying all claims for relief brought in the *pro se* §2255 motion. (A-39-A-82)

On May 2, 2000, Mr. Stantini filed a motion to reconsider under Rules 59(e) and 60 of the Federal Rules of Civil Procedure. On September 21, 2000, the district court dismissed that motion. On August 21, 2001, the Second Circuit again reversed, remanding the case for further proceedings; but the district court ignored all submissions and did nothing.

On June 16, 2003, two and one-half years after final briefing on Mr. Stantini's request for a Certificate of Appealability ("COA"), and only after Mr. Stantini filed a *pro se* Mandamus petition in the Second Circuit forcing some action by the district court, the district court entered its order denying the COA and denying the Rule 60(b) motion, in a decision filled with errors about the procedural history of the case, completely mischaracterizing Mr. Stantini's claims and record facts, and ignoring several fundamental applicable principles of law, including the applicable standard for the evaluation of a request for a Certificate of Appealability. (A-3-A-38)

On February 11, 2004, the Second Circuit summarily denied Mr. Stantini's application to that court for a Certificate of Appealability without any analysis whatsoever of the significant constitutional issues raised in this case, including issues on which there is a direct split among the

federal circuits and issues which absolutely required an evidentiary hearing. (A-1-A-2)

B. Facts material to the consideration of the questions presented

Mr. Stantini was represented at his trial by attorney Charles Carnesi. At the same time, Carnesi represented a defendant, Mannino, who was charged (along with others), in the Southern District of New York, with the same racketeering murder of Oliveri.

Following the conviction, Mr. Stantini, now represented by new counsel, Alan S. Futerfas, filed a motion for a new trial and to vacate the conviction in his case based, primarily, on a conflict of interests which attended Mr. Carnesi's representation of Mr. Stantini at trial. The specific (and only) conflict of interests cited by Futerfas was the fact that Carnesi, while representing Stantini, simultaneously represented Mannino in the Southern District case. During the course of his trial, Mr. Stantini had been offered a plea deal which provided for a ten year prison sentence. He expressed to Carnesi that he could not accept that deal because of the potential negative impact it could have on Carnesi's other client, Mannino. Carnesi did nothing to dissuade Mr. Stantini of that concern, despite knowing that Mannino at that time already had decided to plead guilty and that he (Carnesi) was in the process of negotiating the terms of that deal.[4]

On April 18, 1995, a year after the post-trial motion was filed, Judge Glasser denied Mr. Stantini's motion and set the case for sentencing. On June 15, 1995, Mr. Stantini was

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[4]The district court missed this fact entirely, notwithstanding an affidavit from previous government counsel reflecting the same. Instead, the lower court found, contrary to the record that Mannino was "retried" on the charge after Mr. Stantini's conviction. (A-5) In truth, Mannino and all of his co-defendants entered guilty pleas to the Oliveri murder and to other charges and received a sentence of approximately half of the time Mr. Stantini received, notwithstanding his "minor role" as found by the lower court in this case.

sentenced to 27 years in prison. Mr. Stantini had no significant criminal history.

Mr. Stantini was sentenced under U.S.S.G. §2A1.1, the Guideline applicable to First Degree premeditated Murder, rather than under §2A1.2, the Guideline for Second Degree non-premeditated Murder, notwithstanding the facts that (1) the underlying offense charged in the indictment was **Second Degree non-premeditated** Murder and (2)the jury expressly was instructed **not** to consider "premeditation" because it was not an element of the crime. Moreover, the district court used a version of §2A1.1 which was not even in effect at the time of the alleged crime, notwithstanding the fact that the probation office in the same district in a prior case involving the same defense lawyers and prosecutor already had issued a report for the district advising that §2A1.1 **could not** be applied to a pre-November 1, 1990 non-premeditated murder. The defense lawyers raised no objection and only acknowledged their error in connection with the §2255 investigation. The effect was to subject Mr. Stantini to a sentence at Guidelines level 41 (324-405 months) instead of 31 (108-135 months).

Mr. Futerfas represented Mr. Stantini on his direct appeal from the judgment of conviction and sentence, primarily raising the issue of Carnesi's conflict of interests. Based, in significant part on a finding that Mr. Futerfas had made virtually no showing in support of the conflict issue, the court of appeals rejected the appeal, and on May 14, 1996, affirmed the conviction and sentence. *See US v. Stantini*, 85 F.3d 9, 16-17 (2^{d} Cir. 1996)(noting the "conspicuous absen(ce)" from Futerfas's affidavit of the relevant facts related to the issue of Carnesi's conflict and the adverse effect it caused).

On June 20, 1997, Mr. Stantini timely filed a *pro se* motion to vacate his judgment of conviction and sentence pursuant to 28 U.S.C. §2255. As noted above, the district court erroneously dismissed the motion; but the Second Circuit reversed and remanded.

Although the district court knew that Mr. Stantini was

now represented by counsel, the court ordered the government to file a response to the *pro se* papers, permitting Mr. Stantini only to reply to the government's submission.

On June 19, 1998, before the government filed its memorandum of law, the undersigned wrote to the district court judge raising certain important substantive and procedural issues in the case. Specifically, the undersigned advised the district court that a lot more information had been uncovered about Mr. Carnesi's conflicts of interests while representing Mr. Stantini and information had been uncovered which demonstrated that Mr. Stantini's appellate attorney, Futerfas, who had been hired specifically to raise the Carnesi conflicts, himself had operated under major conflicts of interests directly related to his relationship with Carnesi and Mannino, none of which ever was disclosed to Mr. Stantini.

Futerfas and Carnesi provided affidavits admitting to some of the new facts we learned and confirming Mr. Stantini's averments that he did not know about the conflicts and, to the extent each was not willing to put the most inculpatory information in an affidavit, they both affirmatively agreed that they would testify on those subjects at a hearing if one were held.

Specifically, it was brought to the district court's attention that Carnesi had been disqualified in the Southern District of New York from representing Mannino in connection with the Oliveri murder because he (Carnesi) had been implicated in the defendants' underlying crimes. We learned further that Mr. Futerfas actually had represented Carnesi in that case and that it was through Mr. Futerfas's representation of Carnesi that Carnesi eventually (after a period of well over a year) was permitted to re-enter the Mannino case as counsel. We also learned that Futerfas also represented Mannino as co-counsel with Carnesi throughout the Mannino case.[5]

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[5]Here again, the lower court ignored the facts demonstrated by the record and made its own findings to the contrary, directly against the undisputed facts, and without any evidentiary basis. The court found that

On April 12, 2000, the district court entered a memorandum and order denying out of hand all of Mr. Stantini's claims without providing an opportunity for any discovery and without providing any evidentiary hearing or any other kind of hearing or argument whatsoever. In doing so, the district court ignored all of Mr. Stantini's requests that it decide the pending recusal motion before addressing any substantive issues in the case, as well as Mr. Stantini's requests that he be permitted to fully brief all substantive issues and further flesh out the issues he had raised *pro se* after the recusal motion was decided.

On May 2, 2000, Mr. Stantini filed a motion for reconsideration under FRCP 60(b). On September 21, 2000, the district court dismissed this motion; but on August 21, 2001, the Second Circuit reversed and remanded. Meanwhile, based upon the schedule set in the district court, Mr. Stantini filed his Motion for a Certificate of Appealability in the district court, on November 6, 2000, while the Rule 60(b) matter was pending before the Second Circuit.[6]

Futerfas "only" represented Mannino while Carnesi was disqualified from the Mannino case based on his own investigation. (A-55) This simply is not true as Futerfas acknowledged and as the docket sheet in the Mannino case establishes without question. Futerfas was co-counsel with Carnesi for Mannino in the Mannino case before, during, and after Carnesi's disqualification. He also represented Carnesi in his efforts to get reinstated and he served as "independent counsel" for Mannino at the *Curcio* hearing regarding his co-counsel Carnesi.

[6]As with many of the substantive facts, the lower court has the chronology of events mixed up as well. The court wrote that the COA application was filed on November 6, 2001 and that oral argument was held on it on January 11, 2002. (A-8). The COA application actually was filed on November 6, 2000 and there was never any oral argument held on it. On January 11, 2002, the court held a brief oral argument on the Rule 60(b) motion; but the COA application was pending for 30 months, without any argument permitted, before a decision was entered. Mr. Stantini, through counsel, tried to get the court to rule on the COA application; but the court ignored our letters, leading Mr. Stantini to file a petition for writ of *mandamus*. It was that filing that led to the court's M&O which, predictably reflected the court's displeasure with the

On February 25, 2003, the undersigned wrote to the district court, advising that the government's only trial witness against Mr. Stantini, "Sammy the Bull" Gravano, had just been charged with the murder of a New York City police detective, alleged to have taken place prior to Mr. Stantini's trial. Mr. Stantini requested a formal inquiry by the court, including an inquiry as to whether government counsel had been aware of this murder from Gravano's reportedly full de-briefings prior to trial, and had knowingly withheld this significant information from Mr. Stantini.[7] On March 3, 2003, the district court summarily denied Mr. Stantini's request and refused to conduct any sort of inquiry into the subject.

Finally, on June 16, 2003, two and one-half years after final briefing on Mr. Stantini's request for a Certificate of Appealability, the district court entered a memorandum and opinion denying the request for a Certificate of Appealability and, in the same order, denying relief under Rule 60(b) (A-3-A-38).

The district court's denial of the COA is filled with basic mistakes regarding the material facts and claims in the case and nowhere in the decision does the court recognize the applicable legal standard for the consideration of a COA. Instead, the court addressed its view of the merits of each issue (after mischaracterizing the issue and the relevant facts) and then denied relief, based on its view of the merits, in direct contravention of the applicable law.

This case raises important and recurring constitutional issues, including issues on which the circuit courts have split. At a minimum, Mr. Stantini deserves to have a COA issued

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mandamus petition and denied all relief.

[7]Significantly for this case, Gravano was de-briefed by the FBI about the Oliveri murder for many months and, notwithstanding his disclosure of all other participants in the murder, Gravano never once mentioned Mr. Stantini as having had anything whatsoever to do with the murder. It was not until an FBI agent suggested to Mr. Gravano that perhaps he had "forgotten" that Mr. Stantini had participated in some way, that Gravano then suddenly "remembered" the same and implicated Mr. Stantini.

so he can fully brief the issues below. The issues more than satisfy the standard this Court has set for the issuance of a Certificate of Appealability. Alternatively, this case should be remanded for further consideration in light of the recent decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573, 2004 WL 1402697 (June 24, 2004) which is directly applicable to one issue.

REASONS FOR GRANTING THE PETITION

The trial court's imposition of sentence in this case based on a federal sentencing Guideline that applies exclusively to premeditated murder where the crime of conviction was for a non-premeditated murder and the jury expressly was instructed not to consider premeditation and that it was not an element of the charged offense and where such Guideline language as was relied upon was not even in effect at the time of the alleged offense violates the Fifth and Sixth Amendments to the United States Constitution and the Ex Post Facto Clause of the United States Constitution, is irreconcilable with this Court's jurisprudence, and squarely conflicts with authority from other federal Circuits and with authority from within the Second Circuit itself and involves an important constitutional issue. At a minimum, a remand for further consideration is required in light of this Court's recent decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573 (June 24, 2004). *See e.g. Ditts v. Oregon*, – U.S. –, 2004 U.S. LEXIS 4584 (June 28, 2004)(granting *certiorari* and remanding for further consideration in light of *Blakely*).

This case presents at least one important constitutional issue on which there is a direct split of authority among the federal circuits and a split of authority within the Second Circuit itself. Additionally, the case raises a most compelling and unprecedented series of conflicts of interests among defense counsel, along with other compelling constitutional issues. To deny a Certificate of Appealability in this case clearly violates the rule established by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and renders arbitrary this

important review process, involving the defendant's last meaningful chance for the review of issues of important constitutional and human consequence. The case must be remanded to the Second Circuit for the issuance of a Certificate of Appealability and a full consideration of the underlying merits of the constitutional claims. *See e.g., Tennard v. Dretke*, 542 U.S. –, 2004 U.S. LEXIS 4575 (June 24, 2004)(reversing and remanding where circuit court improperly denied COA under *Miller-El*).

I. IT IS CONSTITUTIONAL ERROR TO SENTENCE A DEFENDANT UNDER A FEDERAL SENTENCING GUIDELINE FOR FIRST DEGREE PREMEDITATED MURDER WHERE THE INDICTMENT CHARGED SECOND DEGREE, NON-PREMEDITATED MURDER AND THE JURY WAS INSTRUCTED ONLY TO CONSIDER SECOND DEGREE MURDER AND NOT TO CONSIDER PREMEDITATION AND IT VIOLATES THE RULE ESTABLISHED IN *MILLER-EL V. COCKRELL*, 537 U.S. 322 (2003) FOR A CIRCUIT COURT TO DENY A CERTIFICATE OF APPEALABILITY WHERE THE DEFENDANT UNDER 28 U.S.C. §2255 HAS RAISED THIS AND OTHER SIGNIFICANT CONSTITUTIONAL ISSUES OVER WHICH THERE IS A DIRECT SPLIT OF AUTHORITY AMONG THE CIRCUITS AND WITHIN THE REVIEWING CIRCUIT ITSELF.

The Legal Standard for a Certificate of Appealability

In considering an Application for a COA, a court must consider and decide separately whether each issue for which the Certificate is sought is appropriate for the issuance of a COA. *Soto v. US*, 185 F.3d 48 (2d Cir. 1999). Only those issues for which the Certificate is issued can be heard on appeal. *Id.*; 28 U.S.C. §§2253(c)(1)(B); (c)(3).

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court clearly set forth the standard that a court is to apply in considering whether to grant a COA. The Court wrote that a

COA should be issued "where a petitioner has made a 'substantial showing of the denial of a constitutional right.'" *Miller-El*, 537 U.S. at 336. Under this standard, a petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* (Citations omitted). A reviewing court should take "an overview" of the claims in the petition and make a "general assessment" of their merit, while asking whether a resolution in the lower court could be "debatable among jurists of reason." *Id.* at 336. The reviewing court simply engages in a "threshold inquiry" which neither requires nor permits a "full consideration of the factual or legal bases adduced in support of the claims." *Id.*

"A COA does not require a showing that the appeal will succeed." *Id.* at 337. Accordingly, "a Court of Appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* It would be wrong for an appellate court to deny a COA, and therefore deny appellate review, because a prisoner "did not convince a judge, or, for that matter, three judges, that he or she would prevail." *Id.* Indeed, "a COA will issue in some instances where that is no certainty of ultimate relief." *Id.*

A claim can be "debatable," as that term is used in this context, "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Finally, the Court wrote that it was error to decide, in effect, the substance of an appeal in the context of considering an application for a COA. Such a manner of proceeding the Court wrote, "undermines the concept of a COA" by making an evaluation of the merits of the substantive issues in a process which should be simply a "threshold inquiry." *Id.* at 342. The question, the Court in *Miller-El* wrote, is the "debatability of the underlying constitutional claim, not the resolution of that debate." *Id.*

(Emphasis added)

With respect to each of the issues for which Mr. Stantini sought a Certificate of Appealability, he more than satisfied the legal standard for the issuance of the same. Indeed, with respect to the sentencing issue, where there is a direct split of authority among the federal circuits, uncertainty within the reviewing circuit, and where the underlying decision contravenes authority from this Court, a COA **must** issue by definition, for surely little could more clearly demonstrate that an issue is "debatable among reasonable jurists."

Moreover, each issue involves matters of significant importance which ought to be reviewed by this Court. The underlying Fifth and Sixth Amendment implications of these issues require that this Court be given the opportunity to review the issues. Denying a COA in a case with the number of Constitutional issues present here, while granting one in other cases renders the process impermissibly arbitrary and runs afoul of both the letter and rationale of *Miller-El*.[10]

This principle should, of course, apply with even greater force where, as here, the significant constitutional claims are meritorious and the consequences are grave.

The Sentencing Issue

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[10]*See e.g., Seifert v. Keane*, 74 F. Supp. 2d 199 (E.D.N.Y. 1999) (Certificate of Appealability granted on claim of ineffective assistance of counsel by trial and appellate counsel; "debatable among jurists"); *Ryan v. Mann*, 73 F. Supp. 2d 241 (E.D.N.Y. 1998)(Certificate of Appealability issued, despite finding of clearly no merit on *Bruton* issue); *Slevin v. US*, 71 F. Supp. 2d 348 (S.D.N.Y. 1999)(Certificate of Appealability granted on ineffective assistance of counsel claim despite finding of complete lack of credibility); *Nova v. Bartlett*, 63 F. Supp. 2d 449 (S.D.N.Y. 1999)(Certificate of Appealability granted on ineffective assistance of counsel issue, despite clear rejection of the issue on the merits); *Lainfiesta v. Artuz*, 2000 U.S. Dist. LEXIS 14257 (S.D.N.Y. September 29, 2000)(Certificate of Appealability granted on issue of right to counsel of choice); *Tankleff v. Senkowski*, 135 F.3d 235 (2d Cir. 1998)(Certificate of Probable Cause issued, finding decisions by other courts on the issue equals "debatable among jurists"); *Collins v. Herbert*, 992 F. Supp. 238 (W.D.N.Y. 1997)(COA granted despite finding that claim was procedurally barred).

Mr. Stantini was convicted of violating 18 U.S.C. §§1952B(a)(1) and (a)(5), conspiracy to murder and murder in the May 3, 1988 death of Francesco Oliveri. The underlying charge to which this racketeering murder conspiracy and murder charge referred in the indictment was New York Penal Law §125.25, a non-premeditated murder in the second degree under New York State Law. The jury expressly was instructed to consider only second degree murder and was only instructed on the elements of second degree murder. Furthermore, the jury expressly was instructed that "premeditation" was not an element or prerequisite for them to consider.(Tr. 1230-31) Nevertheless, at sentencing, the District Court imposed sentence under U.S.S.G. §2A1.1, the guideline for first degree murder, which, after a two-level reduction for minor role, resulted in an offense level of 41 and a sentencing range of 324 - 405 months. Mr. Stantini was sentenced to 324 months in prison. Under the applicable Guideline for non-premeditated murder, §2A1.2, the maximum level would have been level 33 (135-168 months) and with the two level reduction for minor role, Mr. Stantini's range could only have been 108-135 months as a matter of law. The sentence imposed is a minimum of 16 years over the maximum authorized by the law, based on the actual crime of conviction and the applicable Guideline in effect.

Mr. Stantini's constitutional rights to a fair jury trial,[11] to effective assistance of counsel,[12] to due process of law,[13] and under the Grand Jury and Ex Post Facto Clauses[14] were violated in connection with his sentencing. Mr. Stantini also

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[11] *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573, 2004 WL 1402697 (June 24, 2004).

[12] *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Glover v. US*, 531 U.S. 198 (2001); *Jamison v. US*, 4 Fed. Appx. 88 (2d Cir. 2001).

[13] *See e.g., US v. Baker*, 262 F.3d 124 (2d Cir. 2001); *US v. Sullivan*, 242 F.3d 1248 (10th Cir. 2001).

[14] *See e.g., Stogner v. California*, 539 U.S. 607 (2003); *US v. Keigue*, 318 F.3d 437 (2d Cir. 2003).

claims that the sentencing error in this case constitutes plain error requiring reversal.[15]

In arriving at the Guideline to use for sentencing in this case, the Court started out on the right course. It referred first to U.S.S.G. §2E1.3(a)(2) which then referred the Court to the "offense level applicable to the underlying crime or racketeering activity." It is from that point that the Court went wrong in its Guideline selection. The Court turned to U.S.S.G. §2A1.1, the Guideline applicable to first-degree, premeditated murder, rather than §2A1.2, which applies to §1111 non-premeditated murders. *US v. Hanson*, 264 F.3d 988, 996 (10th Cir. 2001)

This was error for several reasons. First, the indictment charged exclusively second degree, non-premeditated murder. Secondly, the court expressly instructed the jury that premeditation was not relevant to their deliberations, not an element of the crime charged, and not to be considered by them. Third, the version of §2A1.1 used by the court in sentencing Mr. Stantini was one which did not even come into effect until November 1, 1990, well after the crime. This last factor will be discussed in a later section of this Petition.

Reasonable Jurists Differ On This Subject

The sharp split of authority among the federal circuits on the question of whether one ever can be sentenced under a Guideline for first degree premeditated murder when the crime of conviction was second degree non-premeditated murder brings this issue squarely within the rule of *Miller-El*, requiring that a COA be issued.

In *US v. Hanson*, 264 F.3d 988 (10th Cir. 2001), the Court was called upon to decide the precise question of whether it is appropriate to sentence a defendant who has been convicted of second degree non-premeditated murder as if he had been convicted of first degree premeditated murder under the federal sentencing guidelines. The Court held that this was not constitutionally permissible. In doing so, the

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[15]*See e.g., US v. Keigue*, 318 F.3d 437 (2d Cir. 2003); *US v. Thomas*, 274 F.3d 655 (2d Cir. 2001)(*en banc*).

Tenth Circuit decided the question in a manner directly in conflict with the Second Circuit and with one half of the judges on the Fourth Circuit, while agreeing with the other half of the judges on the Fourth Circuit. *Compare Hanson* and *US v. Kelly*, 1 F.3d 1137, 1140-41 (10th Cir. 1997) with *US v. Barber*, 119 F.3d 276 (4th Cir. 1997)(*en banc*)(Murnaghan, J., dissenting)(Wilkins, J., dissenting) and *US v. Minicone*, 960 F.2d 1099, 1110-11 (2d Cir.) *cert. denied*, 503 U.S. 950 (1992).[16] The district court's decision

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[16]There is another line of cases in a related area which also highlights the merit in Mr. Stantini's argument. These cases allow the imposition of sentence under §2A1.1 for first degree murder under a felony murder doctrine; but **only** because the Guidelines in effect at the applicable time expressly provide a cross-reference to §2A1.1 if in the course of committing the felony, a death occurs. *See e.g., US v. Weasel Bear*, 356 F.3d 839 (8th Cir. 2004)(applying §2B3.1(c)(1)'s express cross-reference for murder during the commission of a robbery); *US v. Gamez*, 301 F.3d 1138 (9th Cir. 2002)(applying §2D1.1(d)(1)'s cross-reference for murder during the commission of narcotics offense); *US v. Harris*, 238 F.3d 777 (6th Cir. 2001)(applying §2B3.1(c)(1) cross-reference for felony murder); *compare Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002) disallowing capital sentence where indictment did not charge aggravating circumstance). The discussion in the first three of these cases questions whether such cross-references are consistent with the spirit, if not the letter, of *Apprendi*, *see Harris*, 238 F.3d at 779-780 (Merritt, J., dissenting) and they most likely will not be under the letter and spirit of *Blakely*; but at least they are conceptually understandable and are supported both by the well established felony murder doctrine and by a specific cross-reference. Here, there was no question of felony murder; it was strictly non-premeditated second degree murder as the crime charged and of conviction and no basis at all for transmuting that into a premeditated first degree murder. As this Court recently noted, "our Constitution ... do(es) not admit ... that facts are better discovered by judicial inquisition than by adversarial testing before a jury." "The Framers would not have thought it too much to demand that, before depriving a man of (16) more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors.'" *Blakely*, 2004 U.S. LEXIS 4573 at *31. Once the district court selected federal murder under 18 U.S.C. §1111 as the federal analog to New York's second degree murder, it should have seen clearly from the statute itself that, other than for felony murder, not at issue here, the statute clearly made premeditated

here makes no reference whatsoever to any of these cases or at all to the split of authority, notwithstanding Mr. Stantini's briefing on each case.

The Court in *Hanson* found it impermissible to impose a sentence for first degree murder on a defendant convicted of second degree murder because the Guidelines themselves drew the distinction specifically based on the factor of premeditation, with that factor serving as the exclusive dividing line between the two for §1111 murders. *Hanson*, 264 F.3d at 995-996. The Court specifically noted the distinction in the context of comparing §§2A1.1 and 2A1.2. *Id.* at 996. Moreover, the Court expressly noted its disagreement with the analysis on this subject employed by Judge Wilkins in the Fourth Circuit in *Barber*.

The purpose here is not to demonstrate which conclusion on this question is the correct one; rather it is simply to show that reasonable jurists have differed and continue to differ over this important question, as reflected by the split of authority among the federal circuits - indeed the 10th and 2nd Circuit positions are irreconcilable - thereby demonstrating by definition the error in denying a COA in this case, under the *Miller-El* standard.

Interestingly, the Second Circuit itself remains uncertain in this area, further satisfying the *Miller-El* standard for a COA. A consideration of *Minicone* and subsequent authority within the Circuit makes the point.

In *Jamison v. US*, 4 Fed. Appx. 88 (2d Cir. 2001), the Second Circuit characterized *Minicone* as standing for the limited proposition that while, in the context of the murder in that specific case, it was not error for the Court to use the §2A1.1 first degree murder Guideline at sentencing, it had

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murder first degree and non-premeditated murder ("any other murder") second degree. Similarly, the Guidelines make it perfectly clear and simple: **premeditated first degree murder under §1111 gets sentenced under §2A1.1 and second degree non-premeditated murder under §1111 (any murder other than felony murder or premeditated murder) gets sentenced under §2A1.2.** The language of §2A1.1 and the proposed 2004 amendments prove the point.

not held that §2A1.1 necessarily was to be the appropriate Guideline where the crime of conviction was for second degree murder. The Court remanded the case for consideration of whether it may have been ineffective assistance of counsel for sentencing counsel to have failed to challenge the use of §2A1.1 instead of §2A1.2. The decision in *Jamison* alone makes it clear that the question Mr. Stantini has raised is at least "debatable" within the reviewing Circuit itself, thereby making the question one which **demands** the issuance of a COA under *Miller-El*. Mr. Stantini has, of course, raised this precise issue - whether his lawyers were ineffective for not objecting to the imposition of sentence based on a Guideline for first degree murder, rather than the Guideline for second degree murder, as well as based on a Guideline not even in effect at the applicable time - along with the substantive issue that the sentence itself was unconstitutional.

Minicone is also distinguishable from the instant case based on the two different statutes charged in the cases. *Minicone*, for instance, was charged with the murder in the context of 18 U.S.C. §1961 *et seq.*; whereas Mr. Stantini was charged under 18 U.S.C. §1952B(a)(1)&(a)(5) (now codified as §1959(a)(1) & (1)(5)) which, in contrast, requires findings of a violation of state or federal law, therefore opening the door to a more careful consideration of the clearly more applicable second degree murder provision under 18 U.S.C. §1111.[17]

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[17] The lower Court attempted to justify its jury instructions by noting that the first degree murder statute under the New York Penal Law clearly would not have applied in this case, and so that is why it instructed the jury exclusively on second degree murder. (A-28) This is a non-issue. The Court instructed the jury on the elements of second degree murder based upon the indictment in the case; moreover, no one has argued or could argue that the New York State first degree murder statute had any applicability to this case in any event. This simply further supports Mr. Stantini's argument that the analogous and appropriate Guideline to use was the Guideline §2A1.2, the Guideline which applies to the second degree murder provision of §1111, a murder of any variety other than a premeditated murder under §1111. In fact, the district court's

The debate within the Second Circuit and the split of authority among other federal circuits in cases post-dating *Minicone* clearly demonstrate the error in denying a COA.

This Court's recent decision in *Blakely v. Washington*, 542 U.S. –, 2004 U.S. LEXIS 4573, 2004 WL 1402697 (June 24, 2004) makes it clear that the lower court absolutely violated the Sixth Amendment jury trial guarantee by imposing sentence on Mr. Stantini for the crime of first degree premeditated murder when he was charged with and convicted of second degree non-premeditated murder and the jury was instructed to consider only the latter and not to consider the issue of premeditation at all. For these purposes, however, it suffices to rely on the analysis in *Blakely* to demonstrate beyond any question that this issue is at the very minimum one that is debatable among reasonable jurists and therefore requires that a COA be issued. Mr. Stantini respectfully submits that the very least that should occur in this case is that the writ should be granted and the case should be remanded for further consideration by the Second Circuit in light of the decision in *Blakely*.[18]

The sentence imposed in this case also was unlawful

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decision reveals its error; for it knowingly selected a Guideline which required premeditation. (A-29) It seems unable in its decision to understand that reference to §1111 gave the sentencer two choices, §2A1.1 for premeditated murder and §2A1.2 for non-premeditated murder and only the latter could be applied here. *See Hanson, infra.*

[18]Many cases long pre-dating *Blakely* also make the point emphatically that there are Fifth and Sixth Amendment problems with sentencing a defendant under a particular murder Guideline when all of the elements underlying the Guideline were neither charged nor found by the jury. *See e.g., US v. Baker*, 262 F.3d 124, 133 (2d Cir. 2001); *US v. Free*, 841 F.2d 321, 325 (9th Cir.), *cert. denied*, 486 U.S. 1046 (1998); *US v. Bordeaux*, 980 F.2d 534, 536 (8th Cir. 1992). The court's purported reliance on the Assimilative Crimes Act, 18 U.S.C. §13 as justification for choosing first degree murder is completely misguided (even the government disavowed that one at oral argument). This Court's decision in *Lewis v. US*, 523 U.S. 155 (1998) demonstrates the error in choosing first degree murder over non-premeditated second degree murder under the circumstances of this indictment and jury charge. *See also US v. Fortier*, 180 F.3d 1217 (10th Cir. 1999).

because the Court used a formulation of the Guideline that only came into effect after November 1, 1990 (*See* Amendments 310 and 311); whereas, the crime charged occurred on May 3, 1988, over two years before the amended language of §2A1.1 which was used in this case (expanding its coverage), even came into effect. Prior to November 1, 1990, unless a person were convicted of the crime of first degree murder as defined under 18 U.S.C. §1111 (requiring premeditation), only U.S.S.G. §2A1.2 could be applied. This principle applies to both the murder conspiracy and the murder charges.[19]

In *US v. Failla*, this same Eastern District of New York Probation Office expressly wrote that it would create an "Ex Post Facto issue" if a sentence were imposed (where a murder pre-dated November 1, 1990) based on a cross-reference to U.S.S.G. §2A1.1 because the Guidelines were only amended to apply that cross-reference effective November 1, 1990. Accordingly, the Probation Officer noted, the base offense level of 43, applicable under §2A1.1, could not be used as a matter of law. Instead, only §2A1.2, could be used.[20]

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[19]Under U.S.S.G. §1B1.11(b)(1) the sentencing Court must use the Guidelines Manual in effect on the date the offense of conviction was committed, if the use of any other Guideline Manual would result in an increased punishment. This is required under the *Ex Post Facto* Clause. Prior to November 1, 1990, the effective date of Amendment 310 to the Guidelines, a murder had to be "willful, deliberate, malicious, **and** premeditated" to qualify for sentencing under that Guideline. Even after the Amendment's effective date, only a "premeditated" murder or other felony murder (not applicable here) could be sentenced under §2A1.1. Any other murder had to be sentenced under §2A1.2. § 2A2.1, with a base offense level of 20 was the only applicable Guideline for the conspiracy and the district court erred there as well by using a version not in effect at the relevant time.

[20]*See US v. Failla*, Docket No. 93-CR-294 (CPS)(EDNY). Interestingly, both Futerfas and Carnesi and Mr. Stantini's prosecutor were the lawyers in *Failla*; so by the time of Mr. Stantini's sentencing, less than a year later, all were well aware of the issue, yet no one objected to using the wrong Guideline book or a Guideline not in effect at the relevant time. This clearly constituted ineffectiveness and was far

Instead, as the report provided, for a conspiracy to commit murder, cross-reference could only be made to §2A2.1 or §2A1.2 which provide for a base offense level of 20 for a murder conspiracy and 33 for a non-premeditated (second-degree) murder. U.S.S.G. §2A1.1 simply could not be used for a pre-November 1, 1990 murder.

As in *Failla*, §2A1.2 is the Guideline which the Court should have applied to Mr. Stantini as a matter of law. Since the two counts would then be grouped, the higher Guideline Offense Level of 33 would be the applicable level for the greater offense (murder). After taking the two point reduction which the Court found applicable for Mr. Stantini's "minor role" in the crime charged, the maximum sentence that lawfully could have been imposed on him in this case was a sentence in the range of 108 - 135 months (Level 31), a sentence by the way, similar to that which was offered to Mr. Stantini during his trial and afterwards and similar to the sentence received by the defendants in the *Mannino* case who were charged with this same crime and others.

Mr. Stantini further contends that the decision in *Ring v. Arizona*, 536 U.S. 584 (2002) also supports his argument.[21]

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more egregious an error than that which this Court found reversible in *Glover v. US*, 531 U.S. 198, 200 (2001)(ineffectiveness led to error of from 6-21 months - as opposed to over 16 years here). *See also Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003)

[21]Mr. Stantini is aware that this Court has decided that *Ring* does not apply on collateral review. *Schriro v. Summerlin*, 542 U.S. –, 2004 U.S. LEXIS 4574 (June 24, 2004). However, he has argued, *inter alia*, that he should be permitted another opportunity at direct review because of appellate counsel's multiple conflicts of interests. Additionally, it is simply *Ring's* reasoning that he seeks to apply here. Mr. Stantini also has raised a challenge to this sentence also under *Apprendi* and he believes that his analysis under *Apprendi* is correct. However, the Second Circuit's decision in *Coleman* bars a defendant from raising an *Apprendi* claim in a §2255 motion (and, logically, therefore, in a Rule 60(b) motion related to a §2255 proceeding); accordingly, he recognizes that he cannot proceed with the merits of that claim before this Court. Nonetheless, he continues to assert that it was ineffective for his sentencing attorneys to fail to recognize the issue and raise it at

Finally, under the Second Circuit's own analysis in *US v. Keigue*, 318 F.3d 437 (2d Cir. 2003) and in *US v. Thomas*, 274 F.3d 655 (2d Cir. 2001)(*en banc*), the sentencing error in this case constituted plain error as a matter of law.

The district court's decision with respect to the denial of the COA on this issue is virtually meaningless and adds nothing to the discussion. It ignores the actual arguments and most of the submissions made by Mr. Stantini on this issue,[22] ignores the most relevant portions of the jury instructions on which Mr. Stantini's arguments rest,[23] ignores all of the relevant authority from the other circuits and from the Second Circuit (e.g. *Jamison*) that demonstrates the "debatability" of the issue, ignores the conclusion of the Probation Office in another case with the same issues in the same district, and mischaracterizes the arguments that it purports to consider.

Clearly the sentencing issue in this case is one on which a COA had to be issued as a matter of law.

Outrageous Conflicts and Other Issues for Which a COA Should Have Been Issued

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sentencing and on direct appeal and he clearly has been prejudiced by this error. *See Glover v. US*, 531 U.S. 198 (2001); *Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003).

[22]For example, the lower court goes on at great length in asserting that a flaw in Mr. Stantini's argument is that he purportedly only focused on the conspiracy charge and not on the murder charge in his analysis. (A-31-A-33). This is absolutely wrong. As with most of the issues, the court appears simply to have ignored Mr. Stantini's submissions entirely and relied exclusively on the government's mistaken characterization of those submissions. This is a subject on which we specifically and at length disabused the court of because the government had made this claim; yet Mr. Stantini's correction is ignored entirely.

[23]For example, the court ignores entirely the portions of the jury instructions during which it expressly instructed the jury that it should only consider "murder in the second degree" and then instructed the jury exclusively on the elements of "second degree murder." (Tr. 1230-31). The court further ignores its express instruction to the jury that "premeditation" was not an element or a "prerequisite" to a finding of guilt in the case. (Tr. 1230).

Mr. Stantini claims that he was denied his 5th and 6th Amendment rights to due process, to a fair trial, to confrontation, and to the effective assistance of counsel based on multiple conflicts of interests[24] which attended the representation he received at trial, post-trial, at sentencing, and on appeal, and on otherwise ineffective conduct as more specifically identified below. He also claims that he was entitled to discovery and a full evidentiary hearing in connection with the claims. His claims are supported by his own affidavits, affidavits of counsel, and the undersigned's affirmation, based on interviews with previous conflicted counsel, both of whom were prepared to testify under oath at a hearing.

The conduct of the attorneys at issue includes Carnesi's performance at trial, and specifically, his conduct with respect to plea negotiations during the trial [25] and his failure

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[24] The conflicts were: Carnesi simultaneously represented Mannino who was charged with the same crime as Mr. Stantini. The adverse effects from this dual representation were, inter alia, the improper advice Carnesi gave to Stantini regarding a plea offer that was made during trial, his ethical inability to put on evidence exculpating Stantini while inculpating Mannino, and currying favor. Futerfas was then retained by Stantini for the purpose of raising the conflict claim about Carnesi's dual representation. In the §2255 investigation we learned that Carnesi had additional conflicts: he had been disqualified from Mannino's case because he was under investigation for involvement in his client's crimes; Carnesi also represented a defendant, Erasmo Gambino, who was implicated in another Gravano murder never before disclosed. Most shockingly, we learned: Futerfas suffered from the exact same dual representation conflict as Carnesi; he was co-counsel with Carnesi for Mannino. Futerfas also represented Carnesi in the case. All was concealed from Stantini. Additional ineffectiveness was Futerfas's failure to follow Stantini's wishes in accepting a plea deal offered during the post-trial proceedings and the failure to object to sentencing Guideline not in effect at the applicable time, leading to a sentence of over 16 extra years.

[25] Specifically, among other errors, Mr. Carnesi failed to properly advised Mr. Stantini with respect to a plea offer of ten years made by the government during the trial. Knowing that Mr. Stantini's perceived impediment to taking the plea deal that was offered was his concern over the effect it could have on another of Mr. Carnesi's clients, Lorenzo

to properly examine and call witnesses and put forward a theory of defense that would have conflicted with his duty to another client he was simultaneously representing, Lorenzo Mannino. Mr. Stantini has alleged that Mr. Carnesi's representation was attended by various conflicts of interests, including those arising from his joint representation of Mr. Stantini and Mr. Mannino and his own criminal investigation, arising from conduct related to the conduct charged in the indictment facing Mr. Mannino and with this group of defendants, all of which was undisclosed to Mr. Stantini.[26]

Mannino, Mr. Carnesi, nevertheless, failed to advise Mr. Stantini that Mr. Mannino already had decided to plead guilty himself, and that he (Stantini) must act in his own best interests. This issue is especially appropriate for a Certificate of Appealability in light of recent authority emphasizing the importance of plea negotiations in the assistance provided by counsel. *See e.g., US v. Williams*, 2004 U.S. App. LEXIS 11434 (2d Cir., June 10, 2004); *US v. Moody*, 206 F.3d 609 (6th Cir. 2000); *US v. Christakis*, 238 F.3d 1164, 1171 (9th Cir. 2001); *US v. Fernandez*, 2000 U.S. Dist. LEXIS 5721 (S.D.N.Y. May 3, 2000), *reconsideration denied, US v. Fernandez*, 2000 U.S. Dist. LEXIS 8653 (S.D.N.Y. June 22, 2000)(ineffective assistance of counsel for failure to advise defendant to cooperate and based on conflict of interest from multiple representation); *Boria v. Keane*, 83 F.3d 48, 51 (2d Cir. 1996), *rehearing*, 90 F.3d 36 (2d Cir. 1996); Kate Stith and Jose A. Cabranes, *Fear of Judging* 130 (1998)(Plea bargaining is central to criminal law).

[26]At A-67, the Court characterizes Carnesi's criminal troubles as having "been terminated before the proceedings against Stantini had even begun." That simply is not accurate; unless the Court means to exclude from "proceedings" Mr. Stantini's pre-trial period, often referred to as the most important stage of a criminal case. *See e.g., Moran v. Burbine*, 475 U.S. 412, 431 (1986)(the guarantee of effective assistance of counsel must be fulfilled from the very initiation of the criminal process); *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993); Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* (1988) at §106, cited with approval in *US v. Gordon*, 156 F. 3d 376, 390 n.12 (2d Cir. 1998); *Boria v. Keane*, 99 F. 3d 492, 496-97 (2d Cir. 1996).

Additionally, while the Court accurately notes at A-67 that Carnesi was reinstated by Judge Leisure, it is relevant to note further that Judge Leisure required *Curcio* hearing and that Mr. Mannino's *Curcio/Iorizzo* counsel was hardly "independent" in advising him to waive the conflict. To the extent the Court relied on its conclusion that the conflict was

Mr. Stantini's allegations of ineffective assistance of post-trial and appellate counsel by Mr. Futerfas are also based on various conflicts of interests, including the facts that, despite being retained to litigate the issue of Carnesi's conflicts of interests flowing from Carnesi's joint representation of Mannino and Stantini, Futerfas **also** represented Mannino, both for purposes of filing his motions and as "independent counsel" advising him regarding Carnesi's conflicts.[27]

A common theme in the lower court's decisions is the complaint that the case raises purportedly rehashed claims. (E.g. A-14-A-19) This claim simply is not true; nor could it possibly be true. Again, the lower court got mixed up with its facts and got them totally wrong.

Clearly, the claims regarding Futerfas's conflicts and ineffective assistance of counsel are not repeat claims; indeed, they were not even known by Mr. Stantini and could not have been raised before since Futerfas was the previous lawyer in the case and handled the direct appeal.

It is the claims regarding Futerfas that led to the

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meaningless because Carnesi purportedly knew that he had no exposure to prosecution before Stantini's trial began [A-63], this suffers from a number of defects. It ignores authority from such cases as *US v. Fulton*, 5 F.3d 605 (2d Cir. 1993); Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988); *Gov't of the Virgin Islands v. Zepp*, 748 F.2d 125, 134 (3d Cir. 1984)(Higginbotham, J.) which focus on the conflict that arises simply from the accusation, whether or not resulting in prosecution, it further ignores the importance of Stantini's pre-trial stage, and finally, it fails to recognize the relevance to Mr. Stantini of just how Mr. Carnesi's own problems were resolved. This, of course, the district court foreclosed us from proving by denying discovery and a hearing.

[27]The district court characterized Stantini's complaint regarding Futerfas's representation of Mannino as being a complaint that Futerfas represented Mannino "during the period of Carnesi's temporary disqualification from that case." [A-55]. The district court was wrong. In fact, as the record clearly establishes, Futerfas represented Mannino before, during, and after Carnesi's disqualification and reinstatement and he represented Mannino as his attorney and as "independent" conflict counsel regarding the waiver of Carnesi's conflicts. Of course, Futerfas also represented Carnesi in connection with his efforts to get reinstated into the case.

reiteration of certain claims regarding Carnesi; for, as the lower court appears to have recognized, one of Mr. Stantini's claims is that Futerfas did not effectively raise the claims about Carnesi the first time around because of his conflicts, and so they must be raised again. Other claims about Carnesi never were raised before.[28] The district court mistakenly dismissed the claims as just "another fruitless motion for collateral relief brought upon grounds that have been advanced before and rejected at every level of the federal judiciary ..." [A-81][29]

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[28]Mr. Stantini has alleged several adverse effects from conflicts, including losing open plea offers for far lesser sentences, made to both Carnesi and to Futerfas; losing a defense theory that Carnesi ethically was prohibited from pursuing because of divergent interests; having the post-trial issue regarding Carnesi ineffectively raised and supported by Futerfas because of his divergent interests, losing the chance to raise additional conflict issues earlier in the case, a wholesale failure at sentencing, resulting in a sentence over 3 times as long as could have been imposed under the applicable Guidelines (and a failure to raise the same on appeal), and more.

[29]Unfortunately, the lower court, perhaps inadvertently because of a mix-up over the facts, has misstated material facts and legal claims throughout its decisions. For example, in its June 16, 2003 decision denying the COA application, it wrote that the Second Circuit (in the context of the direct appeal) "discussed at length" "the relationship between Carnesi, Stantini and Alan Futerfas." (A-14) That simply is not true; yet it is repeated at A-18 and reference to the Court of Appeals decision is made in support of the lower court's decision not to give an evidentiary hearing. A-18 This is absurd. The claims are completely new here and the single original claim now has evidentiary support from the affidavits. None of the facts raised about the relationship between Carnesi and Futerfas were even known until after this §2255 motion was filed. Similarly, the lower court wrote at the same page of this M&O that "Each and every argument advanced by Stantini in support of his claim that Carnesi was conflicted and thereby ineffective was carefully analyzed by [the Court of Appeals in the direct appeal]" Again, this is absolutely untrue. One of the central arguments raised in the §2255 motion is that Futerfas never raised (or disclosed) Carnesi's conflict arising from his own criminal investigation and the relationship between Carnesi and Futerfas similarly was never before even disclosed or discovered, let alone litigated. It is hard to see how, in good faith, the lower court made these fundamental errors. A list of the lower court's

Mr. Stantini sought the COA on his ineffective assistance of counsel claims in their entirety. There are many subparts to the overall issue (e.g.(1) Whether the Court applied the proper legal standard - *Strickland* - rather than a modified approach (*Cuyler*) reflecting the conflict nature of the ineffectiveness claims, *see Riggs v. US*, 209 F.3d 828, 832, n.9 (6th Cir.), *cert. denied*, 2000 U.S. LEXIS 6020 (2000); *US v. Gonzalez*, 105 F. Supp. 2d 220 (S.D.N.Y. 2000)(disqualifying counsel for conflict); *Mountjoy v. Cunningham*, 2000 U.S. Dist. LEXIS 7212, *22-*27 (D. N.H., May 11, 2000); (2) Whether the Court properly evaluated what it knew about the joint representation type of conflict vis a vis the standard for disqualification. *US v. Rogers*, 209 F.3d 139 (2d Cir. 2000); (3) Whether the Court failed to evaluate and factor in the failure of the government to fulfill its independent disclosure duty regarding the conflicts, *Wood v. Georgia*, 450 U.S. 261, 272 (1981); *US v.*

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factual errors and mistaken premises for its conclusions could go on and on if there were no limitation on space here; however, at least one other must be noted. It is perhaps as difficult to understand as any.

At A-19, the district court writes that the "claimed conflict of Futerfas was argued once again, this time on behalf of Stantini by new counsel and once again rejected ...." It is impossible to know what on earth the district court is writing about here. Clearly a conflict claim about Futerfas **never** before was nor could have been raised in this case for obvious reasons. His conflicts were only were discovered in the context of the §2255 litigation and he was the counsel of record before this §2255 litigation and he certainly could not and did not raise his own conflicts. In fact, he concealed them from everyone. This Court cannot and must not credit a decision by the lower court based so fundamentally on mistakes of critically important material facts. Moreover, this forum (the §2255 litigation) clearly is the appropriate one to raise and fully develop these vitally important constitutional claims, with an opportunity for a full and fair hearing at which all relevant evidence can be adduced. *See Massaro v. US*, 538 U.S. 500 (2003). The lower court's denial of the COA application was based virtually entirely, not only on a mistaken understanding of the legal standard for granting a COA, but fundamentally on wholly mistaken factual premises and that can be permitted. Mr. Stantini's right to this Court's review of his fundamental constitutional trial rights is far too important to have it denied in this manner or at all.

Malpiedi, 62 F.3d 465, 470 & n.3 (2d Cir. 1995); *Ciak v. US*, 59 F.3d 296, 306, n.8 (2d Cir. 1995); *US v. Levy*, 25 F.3d 146, 152 (2d Cir. 1994); *Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir. 1992); *US v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991), etc.); *US v. Harris*, 864 F. Supp. 121, 132 (D.DC 1994); etc.); however, the court should have certified the claims of ineffectiveness *in toto*.

Mr. Stantini requested an evidentiary hearing on the issues raised in his motion. The Court flatly denied this request and refused to provide him with the opportunity either for an evidentiary hearing or oral argument on the motion. It is impossible objectively to reconcile the Court's refusal to provide an evidentiary hearing in this case with the jurisprudence on the subject from the Second Circuit [30] or even from this district court [31], rendering the COA process

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[30] *See, e.g., Armienti v. US*, 2000 U.S. App. LEXIS 26070 (2d Cir., October 17, 2000) (Vacating and remanding §2255 motion to require evidentiary hearing on conflict of interest claims); *Amiel v. US*, 209 F.3d 195 (2d Cir. 2000) (Vacating and remanding for evidentiary hearing and reconsideration denial of ineffective assistance of counsel/conflict of interest claims without evidentiary hearing); *US v. Leone*, 215 F.3d 253 (2d Cir. 2000)(remanding for evidentiary hearing on conflict claim); *US v. Carmichael*, 216 F.3d 224 (2d Cir. 2000)(remand for resentencing due to ineffective assistance of counsel); *US v. Duran-Benitez*, 110 F. Supp. 2d 133, 152-57 (E.D.N.Y. 2000)(evidentiary hearing and relief on ineffective assistance/conflict claim). *See also, Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003)(evidentiary hearing required on appellate ineffectiveness claim); *Dabelko v. US*, 2000 U.S. App. LEXIS 9633 (6th Cir. May 3, 2000) (Vacating and remanding denial of §2255 motion and requiring evidentiary hearing on ineffective assistance of counsel/conflict of interest claim).

[31] *See Lloyd v. US*, 2000 U.S. Dist. LEXIS 8365 (E.D.N.Y. May 18, 2000) (Glasser, J.) (Solicitation by the Court of input, including live testimony, from attorney whose assistance was alleged to be ineffective); *see also Chang v. US*, 250 F.3d 79 (2d Cir. 2001), in which this Court, citing *Armienti* found that an evidentiary hearing is required for such claims as these, permitted Judge Glasser to satisfy that requirement by reviewing the affidavit of counsel who was the subject of the conflict claim. In Mr. Stantini's claim, the affidavits of counsel fully support Mr. Stantini's claims and his claims are factually uncontroverted by any competent evidence; *Samper v. Greiner*, 2003 U.S. App. LEXIS 16624

impermissibly arbitrary. The record in this case required full development of the unprecedented multiple conflicts of interests and ineffectiveness through an evidentiary hearing and this §2255 motion was the appropriate vehicle. *Massaro v. US*, 538 U.S. 500, 504-506 (2003).

The number, kind, and complexity of the conflicts of interests alleged and supported by unassailable facts in the instant case absolutely required an evidentiary hearing, both for the expansion of the record so that it could more fully and fairly reflect what actually occurred with respect to these conflicts and to firmly establish facts in dispute from the supporting materials filed by both sides in connection with the motion. This is especially so here, where both conflicted attorneys agreed to testify truthfully if a hearing were granted.

Brady/Kyles Violations and Evidentiary Hearing

Mr. Stantini claims that he was denied important *Brady/Kyles* material in this case and that his right to due process of law, fair trial rights, and right to effective assistance of counsel, and to confront witnesses against him under the Fifth and Sixth Amendments to the United States Constitution were violated as a consequence.

When the case was first filed, the claim was focused on an excerpt from Gravano's biography, in which, for the first time, he disclosed that he had a secret deal or "understanding" with his lead prosecutor, to the effect that he would never have to testify against any member of his "crew." In order to effectuate this, the government would insure that no member of his crew got indicted during the period of time in which he was committed to testify.

Clearly, as Carnesi acknowledged, this was material information never before disclosed or known to the defense and would have been critically valuable at trial. Such a deal readily would have given rise to a defense theory that

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(2d Cir., August 13, 2003)(vacating and remanding denial of ineffectiveness claim without a hearing or at least without the solicitation of testimony from counsel).

Gravano committed this murder with his crew and now just laid it off on others to protect his crew members.

This was, from the start a most dubious case against Mr. Stantini in any event. Gravano had been debriefed for many months about this murder and he had admitted to committing it with others, providing every last detail - except that he never once mentioned Mr. Stantini as a participant until, after several months, an FBI agent came to him and suggested that maybe he had forgotten that Stantini was with them too.

As the §2255 investigation continued, other important *Brady/Kyles* claims developed. These included: (1) evidence that Gravano likely had committed at least one more murder than he had admitted to (Inzerillo); but Carnesi had been restricted in going after it because of his attorney-client relationship with an alleged co-conspirator of Gravano's in the murder (Erasmo Gambino): (2) Evidence that while in the Witness Protection Program, Gravano was recorded telling other witnesses how to lie at trial and how to "play the game" with the government by telling them what they wanted to hear, etc. The court was provided with newspaper reports detailing it all; (3) Gravano's indictment in New Jersey for the murder of a New York City police officer never before disclosed to this or any other defendant. Mr. Stantini made detailed submissions on each of these material issues and requested a full inquiry and hearing on each of them. The lower court either ignored or denied each request out of hand, without any inquiry whatsoever. Discovery on what the government knew about Gravano's perjury and material omissions was essential. The movants sought specific discovery in this case on the substantive issues raised in the case and on the question of the court's disqualification for judicial bias (this was ignored altogether). The lower court simply denied the request for discovery at A-50-A-53.

The inferences flowing from the allegations Mr. Stantini has made, if credited, would entitle him to relief under §2255, and therefore, must be found to serve as "good

cause" for discovery in this case under the standard set out in *Bracy v. Gramley*, 520 U.S. 899 (1997). Mr. Stantini based his argument not just on Rule 6(a) of the Rules Governing § 2255 Proceedings; but on the Due Process Clause and on the Sixth Amendment; for only through discovery can he fully and fairly litigate his claims of judicial bias and ineffective assistance of counsel, as well as his *Brady* claims.

The district court's whole approach to this case was inconsistent even with the Second Circuit's jurisprudence requiring that all criminal defendants be given at least one full and fair opportunity adequately to litigate their legitimate issues. *See e.g., US v. Ching*, 298 F.3d 174 (2d Cir. 2002); *Littlejohn v. Artuz*, 271 F.3d 360 (2d Cir. 2001); *Fama v. Comm'r of Corr. Serv.*, 235 F.3d 804 (2d Cir. 2000).

The district court's decision at A-39-A-82, addresses in summary fashion only one of the several *Brady/Kyles* issues raised and gives no clue as to how the court arrived at its conclusion that the question of further inquiry into these material facts could not be the subject of differences among reasonable jurists. Mr. Stantini had a right to the material information that he has cited and he must be permitted to pursue the enforcement of his related constitutional rights. He was entitled to a full hearing and the full litigation of these claims. There are fundamentally important 5th and 6th Amendment rights at stake here and Mr. Stantini must be permitted to pursue them.

CONCLUSION

A writ of certiorari should be granted and this Court should review and reverse the decision below. Alternatively, the case should be remanded for consideration in light of *Blakely*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 12 2004
OFFICE OF THE CLERK

No. (2) 04 62

In the Supreme Court of the United States

ORAZIO STANTINI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Appendix to Petition for Writ of Certiorari

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E.D.N.Y
97-CV-3659
Glasser, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Filed: February 11, 2004
Entered: February 11, 2004

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of February two thousand four,

Present:

Hon. Dennis Jacobs,
Hon. Robert D. Sack
Hon. Reena Raggi,
Circuit Judges.

Orazio Stantini,
Movant - Appellant,

v.

03-2561
00-2335

United States of America,
Respondent -Appellee .

Appellant through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT
Roseann B. MacKechnie, Clerk
By: /s/ Lucille Carr

A TRUE COPY
ROSEANN B. MacKECHNIE, CLERK
/s/ Joseph M. Modriguez

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEWYORK

ORAZIO STANTINI,
Petitioner,
-against-
UNITED STATES OF AMERICA,
Respondent.

ROBERT BISACCIA,
Petitioner,
-against-
UNITED STATES OF AMERICA,
Respondent.

97 CV 3659 (ILG), 97 CV 6683 (ILG)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

June 12, 2003, Decided
June 12, 3003, Entered

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

The petitioners have filed applications with this Court seeking Certificates of Appealability which would enable them to appeal this Court's Memorandum and Order reported in 2000 WL 10314. They have also filed motions pursuant to Fed. R. Civ. P. 59(e) and 60(b) addressed to that Memorandum and Order. The background of these proceedings has been set forth in varying degrees of detail and on various

issues over a period of 8 years and reported in *United States v. Bisaccia*, 1995 WL 228397 (E.D.N.Y. 1995), *aff'd, United States v. Stantini*, 85 F.3d 9 (2d Cir. 1996), *cert. denied, Bisaccia v. United States*, 519 U.S. 1000, 136 L. Ed. 2d 390, 117 S. Ct. 498 (1996); *United States v. Bisaccia*, 1997 U.S. Dist. LEXIS 20438, 1997 WL 803721 (E.D.N.Y. 1997); *Stantini v. United States*, 986 F. Supp. 736 (E.D.N.Y. 1997), denied in part and remanded, *Stantini v. United States*, 140 F.3d 424 (1998); *Bisaccia v. United States*, 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014 (E.D.N.Y. 2000); *Bisaccia v. United States*, 2000 U.S. Dist. LEXIS 15987, 2000 WL 1677747 (E.D.N.Y. 2000).

Familiarity with the foregoing will be presumed.

BACKGROUND

Although I have presumed that the reader is familiar with the numerous prior proceedings in this case, perhaps I should also presume the unlikelihood that they will be accessed and read and that a summary historical evolution of this case would be useful.

Stantini and Bisaccia were convicted of conspiring to murder and murder following a jury trial in November, 1993. Stantini was subsequently sentenced to a term of imprisonment of 324 months and Bisaccia to life in prison. The victim was Francesco Oliveri who was murdered in retaliation for a murder committed by Oliveri's sons of a made member of the Gambino Organized Crime Family. Participating in executing that homicide were Bisaccia, Stantini, Lorenzo Mannino, Joseph Gambino and Salvatore Gravano.

Mannino and Gambino were charged with the Oliveri murder in the Southern District of New York. Their trial began in January 1993, and ended in a

mistrial in June 1993. Mannino was represented by Charles Carnesi. Because Carnesi had been under investigation by the United States Attorney in that district, a Curcio hearing was held to ascertain whether he could serve as Mannino's counsel free from conflict. At that hearing Mannino was represented by Alan Futerfas and at the conclusion of it Carnesi was permitted to continue to serve.

Stantini and Bisaccia were indicted in this district in April, 1993. The other participants in the murder were named as unindicted co-conspirators. Stantini was represented at trial by Carnesi. Bisaccia was represented by Joel Winograd and George Abdy. As had been noted, they were both found guilty at the end of a six day trial in November 1993.

Mannino and Gambino were re-tried after Bisaccia and Stantini were convicted, but before they were sentenced. In that interval, Stantini moved for a new trial pursuant to Rule 33 Fed. R. Cr. P. and to set aside his conviction pursuant to 28 U.S.C. § 2255. That motion was based upon his claim that Carnesi, representing both him and Mannino, was conflicted and thus was restrained from representing him effectively. Bisaccia claimed that he was also prejudiced by Carnesi's ineffectiveness and he joined in that motion. Their motions were denied without a hearing in 1995 WL 228397, *supra.*

Stantini and Bisaccia then appealed their conviction and sentence and the denial of their post-conviction motions. Stantini was represented on appeal by Futerfas and Bisaccia by David Lewis of the Legal Aid Society. The Court of Appeals affirmed the conviction

and denials in 85 F.3d 9 and certiorari was denied in 519 U.S. 1000 in 1996.

In the following year, 1997, Bisaccia and Stantini filed separate motions, pursuant to 28 U.S.C. § 2255. Stantini re-asserted Carnesi's ineffective assistance and Futerfas' ineffectiveness in failing to establish it on appeal. Stantini also added a violation of *Brady* claim and new assertions of Carnesi's ineffectiveness. On this motion, Stantini was represented by his present counsel, David Schoen.

Bisaccia revived his previous claims of Winograd's ineffectiveness and, like Stantini, claimed his appellate counsel was ineffective in failing to establish that. He, too, added a violation of *Brady* claim alleging that the government wrongfully withheld information which could have been used to impeach Gravano (a cooperating witness at trial) and which was also exculpatory. He was represented by new counsel, Robin Kay Lord.

This Court noting that the first post-conviction motion was styled as being pursuant to Rule 33 and § 2255, regarded this motion as a second and successive one and transferred it to the Court of Appeals in accordance with *Liriano v. United States*, 95 F.3d 119 (2d Cir. 1996) for a determination of whether it should be permitted to be filed. *See, Stantini v. United States*, 986 F. Supp. 739 (E.D.N.Y. Dec. 4, 1997), *supra.* The defendants not having been sentenced when the first motion was decided, the Court of Appeals held that this motion was not second or successive pursuant to § 255 and re-transferred it. 140 F.3d 424, *supra.*

In connection with the return to this Court, extensive briefs were submitted by the parties which

addressed the issues initially raised in those motions and added new motions to disqualify the Court pursuant to 28 U.S.C. § 455 and for discovery and inspection. In the opinion reported in 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014, *supra,* those motions and the § 2255 motion were denied. Stantini's and Bisaccia's claims of ineffective assistance by their respective counsel were rejected as were their *Brady* claims.

On May 1, 2000, Stantini moved for reconsideration of this Court's opinion or, in the alternative, for relief pursuant to Rules 59(e) and 60(b). Bisaccia joined in this motion. This motion was bottomed upon the claim that Stantini's sentence was based upon a flawed guidelines application in violation of the Ex Post Facto Clause of the United States Constitution. In a letter submission dated August 2, 2000, Stantini claimed that his sentence ran afoul of *Apprendi*. Once again, this Court, for the reasons given in 2000 U.S. Dist. LEXIS 15987, 2000 WL 1677747, *supra,* viewed this motion as a second or successive § 2255 motion and referred it to the Court of Appeals. The Court of Appeals in *Stantini v. United States*, 00-3745 (2d Cir. August 14, 2001), "Ordered that the portion of the authorization motion seeking to raise claims ... in petitioner's Fed. R. Civ. P. 60(b) motion is dismissed as unnecessary and the case is transferred [to this Court] for further consideration in light of ... *Rodriguez v. Mitchell*, 252 F.3d 191, 198-200 (2001)" (holding that a Fed. R. Civ. P. 60(b) motion should not be construed as an application to file a second or successive 28 U.S.C. § 2254 petition). The Court of Appeals further ordered "that the portion of the authorization seeking to raise a new claim is denied because the claim is not based on newly discovered evidence or on a new rule of constitutional law. *See* 28

U.S.C. §§ 2255, 2244(a), (b)." A precisely similar mandate was issued by the Court in *Bisaccia v. United States* on June 20, 2001.

Stantini did not withdraw his Rule 59(e) motion to alter or amend the judgment. That motion must be made within ten days of the judgment, a limitation which is strictly construed and is jurisdictional and cannot be extended in the discretion of the Court. *Lichtenberg v. Besicorp Group, Inc.*, 204 F.3d 397 (2d Cir. 2000). Because the motion was not timely filed, it is barred. The government is correct in also calling attention to the Mandate of the Court of Appeals remanding the case for consideration by this Court of the Rule 60(b) motion only. A consideration of the Rule 59(e) motion is, therefore, beyond the Mandate's scope. *See United States v. Quinteri*, 306 F.3d 1217 (2d Cir. 2002).

This application for a Certificate of Appealability was filed on November 6, 2001. Oral argument was heard on January 11, 2002, following briefing by all sides. Thereafter, further letter submissions on behalf of Stantini were received dated August 14, 2002, October 29, 2002, January 17, 2003, February 13, 2003 and February 25, 2003. The last submission requesting that the Court conduct a "full and thorough inquiry" based upon an indictment of Gravano in New Jersey was denied in a Memorandum and Order dated March 3, 2003.

Letters on behalf of Bisaccia, dated November 7, 2002, January 23, 2003 and February 27, 2003, advised that he joined in Stantini's submissions.

Stantini has requested that a "Writ of Mandamus" issue from the Court of Appeals averring that this

proceeding has remained dormant since January 11, 2002. As has been indicated, submissions in this matter have continued to be received by this Court as recently as February 27, 2003. If Speedy Trial Act considerations are analogous, the time during which motions are pending is excluded until all submissions are in. *See, e.g., United States v. Shakur*, 1987 U.S. Dist. LEXIS 4908, 1987 WL 12404 (S.D.N.Y. 1987), *United States v. Piasecki*, 969 F.2d 494, 500 (7th Cir. 1992) ("Once a motion is filed ... the excludable delay continues ... until the submissions necessary for the court to reach a decision are complete.") The submissions continued to apprise the Court of recently decided cases the petitioners believed were important for me to consider in arriving at a decision on their motions.

In his three page letter of August 14, 2002, counsel called the Court's attention to three cases decided by the Court of Appeals for this circuit. He communicated his understanding of them to be that a district court should allow a § 2255 litigant to freely amend his claims to permit a "full and fair shot at litigating [them] on collateral review." He also supplemented his argument that the sentencing guidelines were erroneously applied to Stantini by the citation of five additional cases and his summary of them.

In his four page letter of October 29, 2002, he advanced further arguments in support of the guidelines issue.

In his two page letter of February 3, 2003, he continued "with his practice of writing to bring to the Court's attention (without extensive argument) recent decisions which are relevant to issues before this Court ...."

And, finally, in a six page letter dated February 25, 2003, he requested a "full independent inquiry discovery and an evidentiary hearing" prompted by events described in that letter. As has been indicated, his request was denied in a Memorandum and Order dated March 3, 2003.

His application for a writ of mandamus would suggest that the submissions are now complete.

Discussion

I. Certificate of Appealability

Five issues require consideration for a determination of Stantini's and Bisaccia's application for a Certificate of Appealability ("COA") and they will be addressed in order in which they are listed in Stantini's Application ("SA") at 2-3.

(1) Their Disqualification Motion

The initial inquiry in this regard must be whether a COA can properly be issued and the answer is to be found in 28 U.S.C. § 2253(c) which provides in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the Court of Appeals from
>
> ***
>
> (B) the final order in a proceeding under section 2255
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The motion for my disqualification was made "pursuant to 28 U.S.C. § 455 and the Due Process Clause of the Fifth Amendment to the United States Constitution." SA5. The gravamen of his claim to entitlement of a COA as regards the denial of this motion would appear to be the disregard of his request that this motion be decided before consideration was given to the other claims upon which his § 2255 motion rested so that in the event it was denied, he could seek a writ of mandamus compelling my recusal. The disregard of that request gives rise to no constitutional infirmity of which this Court is aware, nor has Stantini provided any authority that it does. In *Bracy v. Gramley*, 520 U.S. 899, 904, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997), the Court wrote "... most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar." (Internal citations omitted).

In 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014, *supra*, at *1 FN1, I wrote that the "recusal motion gives every appearance of being untimely," given the law of this Circuit requiring that such motion be made "at the earliest opportunity" after bias is ascertained, citing *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991). The merits of the motion were addressed nevertheless "in order to demonstrate, even more conclusively than the law strictly requires, that both justice and its appearance will be honored in the adjudication of the motion ...." The merits of the motion were fully considered and that consideration

compelled the Court to conclude that there weren't any and that it must be denied. The applicants have failed to make a substantial showing, indeed, they made no meaningful showing at all, that the denial of this motion was constitutionally wanting.

2(a). The Denial of the Request for Discovery

The applicants moved for discovery pursuant to Rule 6(a) of the Rules Governing Section 2255 Proceedings and for an evidentiary hearing on their claims. Rule 6(a) provides that discovery may be granted "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."

To begin with, "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997). The Court then equated the "good cause" standard of Rule 6(a) with an assessment of the discovery request as follows, quoting *Harris v. Nelson*, 394 U.S. 286, 299, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969): "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." 520 U.S. at 908-909.

In the denial of their discovery request, the court was unable to discern any showing of specific allegations which would even remotely suggest the development of facts that would demonstrate an entitlement to relief. Instead, the court concluded "that the petitioners have done little more in their

voluminous submission ... than offer speculative variations on the ineffective assistance claims already specifically addressed and rejected by both this court and the Court of Appeals." 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014*6.

Stantini's invocation of Bracy as providing comfort for his position is misplaced. Bracy was convicted of murder and sentenced to death by a state court judge who was later convicted on federal charges of taking bribes from criminal defendants in other cases in which they were charged with murder. Bracy sought to show that the acceptance of bribes in those cases rendered him actually biased against the state, but also induced a compensatory bias against defendants who did not bribe him to create the appearance that he wasn't "soft" on criminal defendants. In that context, the Court found that Bracy showed good cause for his request for discovery of trial transcripts, depositions of the judge's associates and the judge's rulings to show a pattern of bias. On the facts of that case, the Court held that the primary presumption that public officials have properly discharged their official duties was not applicable. No effort is made by Stantini to even suggest the existence of a relationship between those facts and the facts in this case. Nor have the applicants succeeded in making a "substantial showing" that the denial of their discovery motion deprived them of a constitutional right.

2(b). The Denial of an Evidentiary Hearing

§ 2255 provides in part:

> Unless the motion and the files and records of a case conclusively show that the

> prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto ...

In denying their application for an evidentiary hearing, I wrote that § 2255 does not entitle the petitioners to an evidentiary hearing as a matter of right. I then concluded that the record conclusively showed that a hearing was requested for the sole purpose of re-litigating claims already decided against them or raise no reasonable inference that § 2255 relief should be granted, "the proper course is to determine the motion on the record, without further expenditure of judicial resources." 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014 at *6.

I note that on appeal from his conviction, Stantini also contended that this Court should have held an evidentiary hearing on his claim of ineffective assistance of counsel. The asserted conflict under which his trial counsel (Charles Carnesi), labored by virtue of his representation of a different defendant, in a different case, in a different district and the relationship between Carnesi, Stantini and Alan Futerfas, another lawyer in those events, was discussed at some length by the Court of Appeals. Each and every argument advanced by Stantini in support of his claim that Carnesi was conflicted and therefore ineffective was carefully analyzed by that Court. Those arguments, succinctly stated, were: (1) that the court failed its obligation to inquire into facts and circumstances of a possible conflict of interest; (2) that

Carnesi's dual representation resulted in an actual conflict which, in turn, resulted in providing ineffective assistance in plea negotiations and defense strategy; (3) that the court erroneously rejected those claims without the benefit of an evidentiary hearing. In rejecting his arguments, the Court held that Stantini showed no lapse in representation, that although pleading guilty was a defense strategy that was not pursued, Stantini offered no evidence that the strategy was not pursued because he did not want to plead.[1] Stantini offered no evidence that the plea strategy was not pursued because Carnesi was conflicted or that he was even the least bit interested in pleading guilty. Stantini's arguments that defense strategies were forgone was not persuasive, said the Court, because "to a large extent Carnesi actually pursued the defense strategy that Stantini argued Carnesi ignored because of his loyalty to Mannino ... Stantini's claim is, at bottom that his interests and Carnesi's (and by extension Mannino's) diverged with respect to any concession of Mannino's participation in the murder, and that Carnesi declined to make such a concession at trial because of his conflicting loyalty to Mannino. We disagree on both counts ... Neither Stantini nor Carnesi has alleged any facts regarding the selection of defense strategy at trial. There is no persuasive indication in the record before us that the refusal to concede the guilt of

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[1]In this regard it is important to note that "myriad tactical decisions made by defense attorneys throughout the course of their defense implicitly involve the waiver of constitutional rights but do not necessitate the personal consent of the defendant ... Thus, when defense counsel 'makes tactical decisions ... with constitutional implications,' the defendant's consent is not mandated." *United States v. Joshi*, 896 F.2d 1303, 1307 (11th Cir. 1990) (internal citations omitted.)

Mannino was necessitated by anything other than a determination as to the best possible defense to put on." Based upon that analysis of the record in the light of Stantini's claims, the Court concluded that "On the basis of the record before it, the district court did not abuse its discretion in refusing to grant an evidentiary hearing." 85 F.3d at 17-19. As regards what can only be charitably described as Bisaccia's tag along ineffective assistance claim, the Court held that "Because Bisaccia has failed to raise a plausible ineffectiveness claim, there is no need for further factual development in the district court." 85 F.3d at 20.

The citation of cases which discuss the black letter principles regarding the conflict of interest are all too familiar to be repeated. Those principles are almost always the rungs leading to an ineffective assistance claim and their application is dictated by the fact intensive context in which they are sought to be invoked. Such an application has been repeatedly made here and repeatedly decided against them. The discussion of cases cited by the applicants are not helpful in a determination to be made in this case, namely, whether the application for a COA should be granted. Given the record which has already been amassed and discussed in its various litigated reincarnations, it is this Court's view that they have not made a substantial showing that they have been denied a right which is constitutionally theirs.

3. Ineffective Assistance of Trial Counsel Carnesi

The claimed ineffective assistance of Carnesi was presented and rejected in 1995 WL 228397 (E.D.N.Y. 1995) and that rejection was affirmed by the Court of

Appeals in an in depth discussion in 85 F.3d 9 (2d Cir. 1996). Surely, Stantini is foreclosed from obtaining a COA as to the ineffective assistance of Carnesi claims that were decided there.

4. Ineffective Assistance of Appellate Counsel Futerfas

Futerfas represented Stantini before the Court of Appeals in 1996. Stantini claims that the rejection by that Court of his assertion of Carnesi's ineffectiveness was attributable to Futerfas's ineffectiveness in presenting it.

The government contends, of ineffective assistance that were litigated on Stantini's behalf by Futerfas, were collateral to what appears to be the sole issue raised on direct appeal, namely, that the jury instruction on conspiracy was erroneous. 85 F.3d at 20-21. From that it follows, the government continues, that since the defendant has no constitutional right to counsel in litigating a collateral claim, he cannot raise an ineffective assistance claim. GM[2] 27-29 citing, among others, *Pennsylvania v. Finley*, 481 U.S. 551, 555-56, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987). *See also United States v. Angelone*, 894 F.2d 1129 (9th Cir. 1989) (Petitioner, who has no constitutional right to counsel when mounting collateral attack upon conviction, could not raise ineffective assistance claim on collateral post conviction petition.).

The foregoing aside, Futerfas did present the bases for asserting Carnesi's alleged conflict arising out of his representing Mannino in an earlier and related case.

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[2]GM refers to Government's Memorandum in Opposition to a COA.

His arguments on behalf of Stantini were addressed in 1995 WL 228397 (E.D.N.Y. 1995) and led the Court to conclude that "The defendant must establish a conflict *that is real, not one that is predicated upon an* 'attenuated hypothesis having little consequence to the adequacy of the representation' ... Generalities, speculative and conclusory assertions will not do. The mere 'possibility of a conflict is insufficient to impugn a criminal conviction.' To demonstrate a violation of his Sixth Amendment right, Stantini must establish that an actual conflict of interest adversely affected his lawyer's performance ..., and the mere representation of another defendant in a related case does not constitute actual conflict." 1995 WL 228397 at *5. The Court also concluded that "the claim that another trial strategy was available to Carnesi is similarly specious ... Stantini has not demonstrated that a plausible alternative defense strategy or tactic of any substance could have been pursued but was not because of Carnesi's other loyalties. " 1995 WL 228397 at *6.

Futerfas pursued Stantini's belated discovery of Carnesi's claimed conflict in the Court of Appeals, which affirmed this Court's rejection of it, writing that Stantini's "arguments regarding defense strategy allegedly foregone are not persuasive. To a large extent Carnesi actually pursued the defense strategy that Stantini argues Carnesi ignored because of his loyalty to Mannino ... Stantini's claim is, at bottom, that his interest and Carnesi's (and by extension Mannino's) diverged with respect to any concession of Mannino's participation in the murder, and that Carnesi declined to make such a concession at trial because of his conflicting loyalty to Mannino. We disagree on both counts." 85 F.3d at 18.

The claimed conflict of Futerfas was argued once again, this time on behalf of Stantini by new counsel and once again rejected with the conclusion, after due consideration to essentially the same arguments presented yet again here, that Futerfas's representation of Stantini was not constitutionally defective. 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014 at *11.

Aside from expressing disagreement with the Court's conclusions in terms which can only be described, regrettably, as inappropriately intemperate, Stantini has made no showing of a denial of a constitutional right that, in this Court's view, can be quantified as being substantial.

5. The Brady/Kyles Claim

The gravamen of this claim is that the government failed to disclose an "understanding" or a "deal" that the government made with Gravano that he would never have to implicate his former friends by being allowed to avoid testifying against them. After noting that this Court "rejected the issue out of hand, specifically finding 'no conceivable basis' for a *Brady* claim," he concludes by respectfully submitting without more, "that other jurists would view the issue differently." SA at 20-21. I can add nothing in response to this claim to what I previously wrote in 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014 at *14 except that I find no explanation of why this Court's rejection of his claim was so deficient as to deprive him of a constitutional right. His request for a Certificate of Appealability on this ground is denied.

II. Rule 60(b) Motion

The different objectives sought to be achieved by a motion pursuant to Rule 60(b) Fed. R. Civ. P. and by a petition for habeas corpus pursuant to 28 U.S.C. § 2255 has been succinctly stated in *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001) to be that the Rule 60(b) motion relates to the integrity of the federal habeas proceeding and the § 2255 motion relates to the integrity of the criminal trial.

Stantini relies on Rule 60(b)(1) and (6) for the relief he seeks and not specifying the subdivisions upon which he relies, it is assumed that Bisaccia relies upon those as well.

Rule 60(b)(1) provides in substance that relief from an order or judgment may be granted for reasons of mistake, inadvertence, surprise or excusable neglect and under (b)(6) for any other reason justifying relief from the operation of the judgment. The motion pursuant to 60(b)(1) must be made within one year after the order or judgment was entered and pursuant to 60(b)(6) within a reasonable time. The motion was timely made.

The relief sought pursuant to 60(b)(1) is addressed to mistake, inadvertence, surprise or excusable neglect in connection with the habeas proceeding and not in connection with the trial at which the habeas proceeding is aimed. 252 F.3d at 198-99.

Stantini gives three reasons for his claimed entitlement to relief pursuant to 60(b)(1). Those reasons are: (1) he was only required to give examples of ineffective assistance until a hearing on those issues was afforded; (2) he expected his recusal motion to be

decided before the other motions he made so that, in event the recusal motion was denied, he could seek a writ of mandamus before substantiating the ineffective assistance claims and, in addition, while the recusal motion was pending, he could not amend his petition to add new examples of ineffective assistance; and (3) his counsel's family medical emergencies prevented promptly raising the ground upon which this 60(b) motion is based. Those reasons will be addressed

(1) The sufficiency of examples prior to a hearing.

To begin with, no authority to guide the Court is provided for that proposition either by Stantini in support of it, or by the government to negate it. Guidance may be found, however, in the Rules Governing Section 2255 Proceedings for the United States District Court. Rule 8 does not mandate a hearing, rather, a determination is to be made by the judge upon a review of the proceedings whether a hearing is required. A determination given in this Court's Memorandum and Order reported in 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014 at *5-*6 as follows:

> Section 2255 petitioners are not entitled to an evidentiary hearing as a matter of right, and the record upon which § 2255 motions are decided may be expanded by the addition of affidavits and documentary exhibits as it has been here, without thereby necessitating such a hearing (citation omitted) where, as is also true here, the record conclusively shows that a petitioner seeks discovery and a hearing for the sole purpose of re-litigating claims already decided against him, claims he is

> procedurally barred from raising, or new claims that raise no reasonable inference that § 2255 relief should be granted, the proper course is to determine the motion on the record without further unnecessary expenditure of judicial resources. Accordingly, petitioner's motion for ... an evidentiary hearing is denied.

(2) An expectation that the recusal motion would be decided first

Stantini claims that he entertained the expectation that his request for a preliminary determination of his recusal motion would be granted before he would be required to substantiate his ineffective assistance claim. If that motion were denied he would then seek appellate review by way of mandamus, further forestalling a need to amend his petition to provide further examples of ineffective assistance. It was, and remains, this Court's view for reasons discussed at some length, that the recusal motion was without merit as a matter of law, 2000 U.S. Dist. LEXIS 7231, 2000 WL 703014 at *3-*5, a view about which I am entirely confident, reasonable jurists would not disagree.

Although I have presided over the trial of this case and over post-trial proceedings in 1995, 1997 and 1998, no motion seeking my recusal was made during that period. Although 28 U.S.C. § 144 expressly provides that a recusal motion must be made timely, that requirement does not appear in § 455, but timeliness has been read into that section. *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987). One of the factors to be considered in determining timeliness was stated in *Apple* to be whether granting

the motion would be a waste of judicial resources. 829 F.2d at 334. No allegation has ever been made, nor could it be, that I harbor some personal animus towards either Stantini or Bisaccia. It is well settled that a motion for recusal requires a showing of personal bias which is ordinarily based on extra-judicial conduct and not conduct which arises in a judicial context. The motion, brought pursuant to 28 U.S.C. § 455, is based on a claimed perception of partiality, based, in turn, as near as can be ascertained, upon my adverse determinations of their assorted claims for post-trial relief. The law in this Circuit is consistently and clearly announced to be that adverse rulings by a judge cannot *per se* create the appearance of bias under § 455(a). *In re International Business Machine Corp.*, 618 F.2d 923, 929 (2d Cir. 1980) ("A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest."); *Wilkerson v. McCarthy*, 336 U.S. 53, 65, 93 L. Ed. 497, 69 S. Ct. 413 (1949) ("A timid judge, like a biased judge, is intrinsically a lawless judge.") Cases to the same effect can be cited endlessly.

In its memorandum of law in opposition to this motion, the government asserts that requiring "a recusal motion to be decided first, to permit review via mandamus, would contradict established legal principles." GM 16. It cites in support of that view, 28 U.S.C. § 1291 as reflecting the intention of Congress to limit the jurisdiction of the Court of Appeals to "final decisions of the district courts"; and *United States v. Hollywood Motor Car Company, Inc.*, 458 U.S. 263, 265, 73

L. Ed. 2d 754, 102 S. Ct. 3081 (1982) which decided that "departures from the rule of finality [are permitted only] in a limited number of cases falling within the 'collateral order' exception delineated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-57, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949) ...." Such orders must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from final judgment." The government then contends that the defendants are unable to meet that standard and, therefore, would not be "entitled to appellate review by way of the extraordinary writ of mandamus" designed to be used only in extraordinary cases and not as a substitute for appeal.

The cases decided by the Court of Appeals for this circuit take a broader view. The case cited perhaps most frequently for the contrary view is *Rosen v. Sugarman*, 357 F.2d 794 (2d Cir. 1966) (Friendly, J.) which held that "in an appropriate case mandamus could issue to order such disqualification" but added that "To be sure, writs in such cases should be used sparingly and only when the facts alleged clearly call for relief, lest mandamus to review refusals of disqualification become a potent weapon for harassment and delay." 357 F.2d at 796-97. *See also In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) ("For both prudential and practical reasons, we must be slow to 'foster piecemeal review and disturb the historic relationship between trial and appellate courts' ... It is only in unusual situations that interlocutory review of a judge's refusal to step aside is available through mandamus."); *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326 (2d Cir. 1987) ("It is well-settled

that the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is 'clear and indisputable.'") *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 18, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). Other than disagreement with this Court's prior rulings, the petitioners have pointed to no extra-judicial conduct which would make their entitlement to relief clear and indisputable. To grant their recusal motion would have been a waste of judicial resources.

(3) Timeliness issue notwithstanding, the Rule 60(b) motion is considered in its entirety.

The Sentencing Issue

Stantini and Bisaccia were convicted of violating 18 U.S.C. §§ 1952B(a)(1) and (a)(5). Those statutes have been renumbered without substantive change to 18 U.S.C. §§ 1959(a)(1) and (a)(5). The current statutory references will be used hereafter.

§ 1959(a)(1) provides in relevant part as follows:

> (a) Whoever ... for the purpose of maintaining or increasing position in an enterprise engaged in racketeering activity, murders ... any individual in violation of the laws of any State or the United States ... shall be punished -
>
> > (1) for murder, by death or life imprisonment, ...

(5) for attempting or conspiring to commit murder ... by imprisonment for not more than ten years ...

In charging the jury regarding Count Two of the indictment, alleging a violation of § 1959(a)(1), the

Court instructed them that the government must prove each of the following elements beyond a reasonable doubt to warrant a finding of guilt:

1. That the defendant had a position in an enterprise which was engaged in racketeering activity;

2. That the defendant murdered Francesco Oliveri;

3. That the defendant acted knowingly and wilfully; and

4. That the defendant's purpose in committing the murder was to maintain or increase his position in the racketeering enterprise.

For the purpose of this motion, the instruction on the second element only, namely, that the defendant murdered Francesco Oliveri, is relevant. At the outset, it is important to note that § 1959 makes punishable the murder of an individual "in violation of the laws of any State or the United States." The only section of Title 18 of the United States Code addressing a murder such as is charged here is § 1111. That section provides in relevant part as follows:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by ... any ... kind of willful, deliberate ... and premeditated killing; ... is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States whoever is guilty of murder in the first degree shall be punished by death or by

> imprisonment for life; whoever is guilty of murder in the second degree shall be imprisoned for any term of years or for life.

Although a literal reading of § 1111(a) would suggest that it is the statute that should be applicable to the crime with which the defendants were charged, it was not the statute about which the jury was instructed. The cases addressing the scope of § 1111 are very few but construe it as being applicable only to murders "within the special maritime and territorial jurisdiction of the United States" by virtue of the limitation of subsection (b). In *United States v. bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000), Judge Sand wrote, at p. 204: "Section 1111(a) defines murder in the first and second degrees. Section 1111(b) specifies the penalties for each of these two types of murder, and limits the reach of Section 1111 to murders committed 'within the special maritime and territorial jurisdiction of the United States.' 18 U.S.C. § 1111(b)." (emphasis added). Further on, at p. 205, he wrote: "The actual Section 1111, however, includes its own jurisdictional element, viz., 1111(b) -- which limits Section 1111 as a whole to murders committed 'within the special maritime and territorial jurisdiction of the United States.'" (emphasis added). *See also United States v. Parker*, 622 F.2d 298, 301 (8th Cir. 1980) ("It is essential to ... the premeditated murder charges in this case that the actions constituting [that] offense took place 'within the special maritime and territorial jurisdiction of the United States'"); *United States v. Wilson*, 565 F. Supp. 1416, 1428-29 (S.D.N.Y. 1983) (Weinfeld, J.). Francisco Oliveri was not murdered "within the special maritime and territorial jurisdiction of the United States" and, therefore, § 1111 was not applicable. For that reason

and because § 1959(a) explicitly addresses "murders in violation of the laws of any State," it was necessary and entirely appropriate to invoke the Assimilative Crimes Act, 18 U.S.C. § 13. Accordingly, the jury was instructed on § 125.25 of the New York Penal Law which provides in relevant part as follows:

A person is guilty of murder in the second degree when:

> 1. With intent to cause the death of another person, he causes the death of such person
> ...

Murder in the second degree is a Class A-1 felony and New York Penal Law § 70.00(2)(a) provides that a Class A felony is punishable by life imprisonment.

A violation of 18 U.S.C. § 1959(a)(1), of which the defendants were convicted, made punishable by death or life imprisonment, is similarly classified as a Class A felony in 18 U.S.C. § 3559(a)(1).

New York Penal Law § 125.27, defining murder in the first degree, would not have been applicable to either defendant as a reading of that statute would readily reveal.

Thus, the only statute applicable to the crime of murder with which the defendants were charged and convicted was § 125.25.

The presentence report applied U.S.S.G. § 2E1.3(a)(2) which provides that in determining the base offense level for violent crimes in aid of racketeering activity (of which the defendants were convicted as charged in Count Two of the indictment) "the offense level applicable to the underlying crime or racketeering

activity" should be applied. It is crucial to note that the Application Note to that Guideline provides: "If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used."[3] The most analogous federal offense to New York Penal Law § 125.25, the jurisdictional limitation aside, is plainly 18 U.S.C. § 1111, the only federal statute explicitly criminalizing a murder "perpetrated from a premeditated design unlawfully ... to effect the death of any human being" and defining that as "murder in the first degree."[4] The underlying crime or racketeering activity being murder, U.S.S.G. § 2A1.1 captioned "First Degree Murder" with a base

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[3]The Application Note was in effect on November 1, 1987 and has been in effect continuously thereafter. There is thus no ex post facto issue

[4]Other statutes criminalizing murder which are not prosecutable under § 1111 but could be were it not for the jurisdictional limitation, make reference to that statute when the punishment to be imposed is "as provided in section 1111." See, e.g., 18 U.S.C. §§ 115(b)(3); 351(a); 1751(a). In §§ 24(j) and 1512(a)(3)(A) the formulation is slightly different. § 924(j) provides, in relevant part, that "A person who causes the death of a person through the use of a firearm shall (1) if the killing is a murder (as defined in section 1111) be punished by death or life imprisonment ...." And § 1512(a)(3)(A) provides in relevant part, "The punishment for an offense under this section is in the case of a murder (as defined in section 1111) the death penalty or imprisonment for life." That Congress intended to punish the intentional murder of another by death or life imprisonment is thus made manifest by the reference to § 1111 in those other statutes.

That intention was also made manifest by U.S.S.G. Appendix A – Statutory Index which makes § 2A1.1. applicable to those offense and for others where death ensues. See 18 U.S.C. §§ 1992(b), 2118(c)(2), 2245, 2280(a)(1)(H), 2281(a)(F), 2332a(a)(3) and 2332b(c)(2)(A).

offense level of 43 was applied. *See United States v. Minicone*, 960 F.2d 1099, 1110-11 (2d Cir.), *cert. denied*, 503 U.S. 950, 117 L. Ed. 2d 648, 112 S. Ct. 1511 (1992); *United States v. Diaz*, 176 F.3d 52, 122-23 (2d Cir.), *cert. denied*, 528 U.S. 875 (1999).

In a "Motion for Reconsideration" annexed to an Affirmation by Counsel for Stantini, dated May 1, 2000, the Court is asked to consider a Statement of Facts consisting of eleven numbered paragraphs (Schoen Aff. 3-5). After noting that the statutes the defendants were convicted of violating were re-numbered from 18 U.S.C. §§ 1952B(a)(5) and (a)(1) to 18 U.S.C. §§ 1959(a)(5) and (a)(1) without substantive change, he states the following:

> 3) Both statutes 1952B(a)(5) and (a)(1) describe the criminal acts to include ... or attempts or conspiracy so to do ... *Id.* The difference being:
>
> (a)(5) is for the [conspiracy] to commit a murder, and
>
> (a)(1) is for the [conspiracy to attempt to commit a murder. Both, in aid of racketeering enterprises.
>
> ***
>
> 5) The government's version of this criminal action alleged:
>
> a) The act was committed in [conspiratorial] concert with at least, Robert Bisaccia, John Gotti, Salvatore "The Bull" Gravano, Giovanni Gambino, Lorenzo Mannino, and others (*see* PSI P 1, p.3).

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> 6) On or around November 26, 1993, this Court instructed the jury that it was to consider the "conspiracy" allegations of the statute towards a finding of guilt towards both charged counts. There was no special verdict slip every introduced to the jury to determine any culpability beyond the instructed conspiracy charge. (1st Degree Murder never even alleged).

His view of § 1959 suggests that it is aimed at a conspiracy only and not at a substantive offense. He is wrong. § 1959(a) plainly aims at both, and subdivisions (1) and (5) provide the punishment for each. Thus:

> (a) Whoever, ... for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, ... any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished –
>
> > (1) for murder, by death or life imprisonment, ...
>
> ***
>
> (5) for attempting or conspiring to commit murder ... by imprisonment for not more than ten years ... (emphasis added).

His view of the government's version of the criminal action as alleging that the "act was committed in [conspiratorial] concert" is a revision of the indictment. Count One is captioned "Conspiracy to

Murder -- Francesco Oliveri" and then charges the named defendants together with named others "for the purpose of gaining entrance to, maintaining and increasing position in the Gambino Family, an enterprise engaged in racketeering activity, conspired to murder Francesco Oliveri (Title 18, United States Code, Sections 1952B(a)(5) ....)" Count Two is captioned "Murder -- Francesco Oliveri" and then charges the named defendants together with named others "for the purpose of gaining entrance to, maintaining and increasing position in the Gambino Family, an enterprise engaged in racketeering activity, murdered Francesco Oliveri. Title 18 United States Code, Sections 1952B(a)(1) (1984) 2 and 3551 *et seq.*)" (emphasis added). It is late in the day to dispute that a substantive crime and a conspiracy to commit that crime are not the same offense. *See United States v. Felix*, 503 U.S. 378, 389, 118 L. Ed. 2d 25, 112 S. Ct. 1377 (1992); *United States v. Sessa*, 125 F.3d 68, 71 (2d Cir. 1997).

His view of the jury charge as instructing the jury "that it was to consider the 'conspiracy' allegations of the statute towards a finding of guilt towards both charged counts" is wrong. The jury was instructed in part as follows on Count One:

> A conspiracy to commit a crime is an entirely separate and distinct offense from the substantive crime charged in Count Two of the indictment. For example, you can find that the defendant you are considering committed the substantive offense charged in Count Two, but that the government did not prove beyond a reasonable doubt the conspiracy charged in

> Count One. Or, you may find that the defendant you are considering did commit the crime of conspiracy but that the government did not prove beyond a reasonable doubt that he committed the substantive offense. (Tr. at 40-41.)

His assertion "that there was no special verdict slip ever introduced to the jury to determine any culpability beyond the instructed conspiracy charge" is wrong. In evidence as Court's Exhibit # 2 (*see* docket sheet entry # 54) is the Verdict Sheet given to the jury when they retired to deliberate and reads as follows:

How do you find the defendant Robert Bisaccia as to Count One of the indictment?

Guilty Not Guilty

How do you find the defendant Robert Bisaccia as to Count Two of the indictment?

Guilty Not Guilty

How do you find the defendant Orazio Stantini as to Count One of the indictment?

Guilty Not Guilty

How do you find the defendant Orazio Stantini as to Count Two of the indictment?

Guilty Not Guilty

In paragraph 8 of the Statement of Facts, he states that "Nowhere in Stantini's PSI report was there any mention as to which Guideline Manual was used for sentence determination. Stantini committed his crime during 1988 and was sentenced in 1995.'" The footnote reads: "A gleaning of the PSI report reveals some

undefined Guideline Manual post November 1, 1990 was used since the writer describes the Count I punishment based on Guideline § 2A1.5(c)(1). This section was first introduced in an amendment # 311 on November 1, 1990. Previously, the conspiracy to commit murder was described under § 2A2.1." In paragraphs 9, 10 and 11, he states in substance that prior to November 1, 1990, U.S.S.G. § 2A1.1 was applied to first degree murder as per 18 U.S.C. § 1111 and therefore, Stantini was sentenced more onerously, in violation of the ex post facto clause, an argument never previously presented to the Court and provides further support for his claim of ineffective assistance. The argument is misplaced, based as it is entirely upon the conviction for conspiracy to murder and the guidelines applicable to that offense. The presentence report applied the guidelines correctly and the absence of a specific reference to the guidelines in effect prior to or after 1988 was irrelevant since either version would have produced the same result.

From the date of its inception on November 1, 1987 U.S.S.G. § 1B1.2(a) taught that the court should determine the offense guideline section applicable to the offense and conviction by referring to the Statutory Index to determine the Chapter Two offense guideline. That index indicated that for an offense under § 1959, reference should be made to U.S.S.G. § 2E1.3. That Guideline and the relevant Application Note to it has been set out above. 18 U.S.C. § 1111 is the most analogous offense to be used and § A1.1, First Degree Murder, is the guideline to which the Statutory Index directs.

Stantini observes that prior to November 1, 1990, U.S.S.G. § 2.1 was captioned "Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder." A reading of that guideline readily reveals no provision for the case where the conspiracy then resulted in murder. Application Note 1, however, makes reference to the fact that the "maximum term of imprisonment authorized by statute for conspiracy to murder is life imprisonment (18 U.S.C. § 1112)." A reading of 18 U.S.C. § 1112 also readily reveals that it would have no application to the murder for which these defendants were convicted and yet, the Statutory Index referenced § 2A2.1 for that offense.

Amendment 311, effective November 1, 1990 was obviously designed to fill the gap. The title of 2A2.1 was amended to read: "Assault with Intent to Commit Murder; Attempted Murder." The existing guideline was amended by deleting it in its entirety and inserted instead in relevant part, was:

> (a) Base Offense Level
>
> > (1) 25, [instead of the previous 20] if the object of the offense would have constituted first degree murder;
>
> ***

The commentary to § 2A2.1 captioned "Statutory Provisions" was amended to replace the existing provisions with §§ 1113, 1116(a) and 1251(c)" none of which would have applied to the murder of Francesco Oliveri. The "Application Note" was amended by inserting the following additional note:

> 2. "First degree murder" as used in subsection (a)(1), means conduct, that if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.

U.S.S.G. § 2A1.5 was inserted for greater clarity to cover conspiracy or solicitation to commit murder, the phrase omitted from the caption to § 2A2.1.

The presentence report applies the Guideline as thus amended to Count One arriving at an adjusted offense level of 43 (PSI P25) but in P33 indicates that the statutory maximum term of imprisonment is 10 years pursuant to § 1959(a)(5).

Count Two, the substantive crime of murder, however, required the application of the same guideline § 2A1.1(a), an adjusted offense level of 43 (life imprisonment) which was also the maximum term of imprisonment pursuant to § 1959(a)(1).

Stantini, however, was given a two point adjustment for his role in the offense so that his base offense level was reduced to 41 providing for a guideline range of 324 to 405 months given a criminal history category of I, and he was sentenced at the low end of that range to 324 months. A similar two point adjustment was not warranted for Bisaccia and he was sentenced to life imprisonment.

The attack upon the sentence, invoking *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), is also misplaced. It presupposes that the elements of the offense (murder in the first degree) were not presented to the jury who were instructed to

determine whether the defendants committed the crime of second degree murder in violation of N.Y. Penal Law § 125.25 and were then sentenced for first degree murder. *Apprendi* decided that any factor, other than a prior conviction, that increases the statutory maximum sentence must be submitted to the jury. *Apprendi* was not implicated here at all. There was no additional factor to be submitted to the jury. As has already been indicated, second degree murder is a class A-1 felony under N.Y. Penal Law § 125.25(4) and pursuant to N.Y. Penal Law § 70.00(2)(a) a class A felony is punishable by life imprisonment. The crime for which the defendants were convicted, "murder in aid of racketeering," in violation of 18 U.S.C. § 1959(a)(1), is punishable by death or life imprisonment. The statutory maximum sentence was not increased whether viewed through the lens of §§ 125.25 or 1959(a)(1) and *Apprendi* is not offended.[5]

The petitioners' claim of ineffective assistance of counsel insofar as that ineffectiveness is based upon their failure to assert the erroneous application of the Guidelines and suffered their clients to be sentenced to excessive terms of imprisonment is meritless. Counsel's assistance does not fall below any objective standard of reasonableness by failing to press a legally indefensible position.

For all the foregoing reasons, the petitioners' applications for a certificate of appealability and for

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[5]§ 1959(a)(1) was amended in 1994 to read as it now does providing for death or life imprisonment. Prior thereto and at the time the murder of Francisco Oliveri was committed, it read: "for murder or kidnapping by imprisonment for any term of years or for life ...." In either case, the statutory maximum was not exceeded and Apprendi was not implicated.

relief pursuant to Rule 60, Fed. R. Civ. Proc. are denied. References made in the course of this opinion to Stantini are applicable to Bisaccia who has joined in Stantini's applications and all of whose claims are similarly without merit.

SO ORDERED.

Dated: June 12th, 2003

Brooklyn, New York

/s/ Leo Glasser

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEWYORK

ROBERT BISACCIA,
Petitioner,
-against-
UNITED STATES OF AMERICA, Respondent.

ORAZIO STANTINI, Petitioner,
-against-
UNITED STATES OF AMERICA, Respondent.

97 CV 6683 (ILG), 97 CV 3659 (ILG)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 7231

April 12, 2000, Decided
April 12, 2000, Entered

MEMORANDUM and ORDER

GLASSER, United States District Judge:

Before the Court are the motions of Robert Bisaccia and Orazio Stantini to vacate, set aside, or correct their sentences pursuant to 28 U.S.C. § 2255; the motion of Bisaccia for discovery and inspection, in which Stantini joins; and the joint motion of both Bisaccia and Stantini for my disqualification pursuant to 28 U.S.C. § 5. The petitioners also seek a hearing for the purpose of

adducing purportedly new evidence relevant to their § 2255 claims. For the reasons that follow, the request for an evidentiary hearing is denied, and the petitioners' motions are also denied, in their entirety.

PROCEDURAL BACKGROUND

The underlying facts of this case have been recited in an opinion by this Court denying a motion by Stantini, in which Bisaccia joined, styled as a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and to vacate the conviction and sentence pursuant to 28 U.S.C. § 2255, which was affirmed on appeal by the Second Circuit. Familiarity with those decisions is assumed. *See United States v. Bisaccia*, No. 93- CR-479, 1995 WL 228297 (E.D. N.Y. Apr. 12, 1995), *aff'd sub nom. United States v. Stantini*, 85 F.3d 9 (2d Cir.), *cert. denied*, 519 U.S. 1000 (1996).

Subsequently, both petitioners filed motions to vacate their convictions and sentences, which the Court treated as successive motions under 28 U.S.C. § 2244(b)(3) and the principles enunciated in *Liriano v. United States*, 95 F.3d 119 (2d Cir. 1996), and accordingly transferred to the Second Circuit pursuant to 28 U.S.C. § 1631. *See Stantini v. United States*, 986 F. Supp. 736 (E.D. N.Y. 1997); *Bisaccia v. United States*, 1997 U.S. Dist. LEXIS 20438, No. 97- CV-6683, 1997 WL 803721 (E.D. N.Y. Dec. 1, 1997). In turn the Second Circuit, finding that this Court had erred in deeming the motions below to be successive, transferred the Stantini case back to this Court for determination as an initial motion made pursuant to 28 U.S.C. § 2255. *See Stantini v. United States*, 140 F.3d 424 (2d Cir. 1998).

Upon transfer, that case was consolidated with Bisaccia's as another initial § 2255 motion.

In December, 1998 Bisaccia moved to disqualify me from further proceedings on his § 2255 motion. Stantini has since joined in that motion. In addition, Bisaccia has moved pursuant to Rule 6 of the Rules Governing § 2255 Proceedings for leave to seek discovery of various documents and exhibits that, he argues, are necessary for and relevant to the adjudication of the claims for relief made in his petition. Stantini has also joined in that motion.

Discussion

I. The Petitioners' Motion to Disqualify

The petitioners adduce several grounds purportedly mandating that this Court be disqualified from further proceedings in this matter.[1]

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[1]The petitioners' recusal motion gives every appearance of being untimely. The law of this Circuit requires such motions to be made "at the earliest opportunity" after information relating to possible bias is obtained. *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991). The petitioners were in a position to advance all but the last of their grounds for recusal at the time their petitions were initially filed in 1997, yet they tarried for more than a year. (Indeed, the Court was made privy to some of the soul-searching to which Stantini's counsel was moved in considering whether to bring the motion. (*See* Letters from David Schoen of June 19, 1998 and July 13, 1998.)) Nevertheless, the Court will address the merits of petitioners' claims in order to demonstrate, even more conclusively than the law strictly requires, that both justice and its appearance will be honored in the adjudication of the motions within.

(i) because, well before petitioners' trial, I issued an order of disbarment against Bisaccia's trial counsel, Joel Winograd, I am in a position to give direct testimony material to Bisaccia's claim of ineffective assistance of trial counsel (BM 1-2)[2];

(ii) because, due to ineffective assistance of appellate counsel, the Second Circuit erred in finding that I could not reasonably have known of the possibility of Carnesi's conflict of interest until the testimony of Agent Petrouskie, that issue is now again before this Court, and my state of mind at the time of petitioners' trial is now a material issue (SBM 2-3);

(iii) I was "privy" to a plea agreement with cooperating witness Salvatore Gravano, and to "events occurring in other cases before the Court and outside the confines of a specific case in connection with Gravano's decision to 'cooperate,'" which were withheld or concealed from the defendants (BM 3; SM 6);

(iv) I was also "aware of some . . . criminal activity" by Gravano that the Government

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[2]"BM" refers to Bisaccia's pro se Memorandum of Law in Support of Motion for Recusal; "SBM" refers to the Memorandum of Law in Support of Bisaccia's Motion for Recusal prepared by Robin Kay Lord, Esq.; "SM" refers to Stantini's Memorandum of Law in Support of the Motion for Disqualification.

failed to disclose to defendants in violation once again of their rights under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and its progeny (BM 3);

(v) it "appears," notwithstanding the conclusions to the contrary of the Second Circuit, that I was "well-informed about the Mannino trial prior to [Bissacia]'s trial and knew that [Stantini's trial counsel Charles] Carnesi represented Mannino in that trial" (BM 4);

(vi) this Court reached conclusions about Carnesi's conflict of interest that are so "predetermined" as to render it incapable of reconsideration in light of new evidence submitted by Bisaccia (SM 3);

(vii) this Court's "comments about Gravano and comments and implications about his credibility at his sentencing and perhaps elsewhere . . . give rise . . . to the appearance of a lack of impartiality on the question of Gravano and his credibility" (SM 4);

(viii) because this Court initially determined that the petitioners' motions herein were successive, which determination the Second Circuit subsequently found to be error, the "appearance of justice" can only be maintained if the motions are determined by a different trial court (BM 8-9).

The seventh claim, concerning this Court's purported bias regarding Gravano, has been thoroughly discussed, and rejected, in an opinion the petitioners saw fit to cite only in passing. There is no need to belabor the points made there, beyond to incorporate them here by reference. *See Garofalo v. Gravano*, 23 F. Supp. 2d 279 (E.D. N.Y. 1998). The eighth claim may similarly be disposed of in summary fashion by the observation that if § 455 really did require recusal on the occasion of every reversal and remand or transfer back by a Court of Appeals, the result would be district court dockets thrown into chaos. More to the point, such a requirement would be difficult to reconcile with the provision of § 2255 that motions thereunder be brought in the sentencing court. *United States v. Hayman*, 342 U.S. 205, 212-13, 96 L. Ed. 232, 72 S. Ct. 263 (1952) (surveying the legislative history of § 2255, and noting that the reasons underlying the requirement that motions be made in the sentencing court included the sentencing court's ready access to, and familiarity with, the record of the case).

Petitioners' sixth claim simply states that because this Court has reached conclusions bearing on some of the issues raised here, it is incapable of revisiting those issues in a disinterested manner. But, it is settled in the jurisprudence of § 455 that "the mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976). It is equally true that the mere fact of prior

rulings in the proceeding, solely because they were adverse, is insufficient to satisfy the criteria for disqualification under § 455. *See Liteky v. United States*, 510 U.S. 540, 554, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion [, because i]n and of themselves . . . they cannot possibly show reliance upon an extrajudicial source").

The remaining claims present variations on the contention that I am a material witness in these § 2255 proceedings, and must therefore disqualify myself pursuant to 28 U.S.C. § 455(b)(5)(iv). That provision states that a judge

> shall also disqualify himself [when] he . . . is to the judge's knowledge likely to be a material witness in the proceeding.

The law is clear that the knowledge at issue under § 455(b) must derive from an extrajudicial source. The mere act of participating in and presiding over judicial proceedings does not trigger the mechanisms of disqualification. *See In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988) ("under § 455(b)(1) what a judge learns or comes to believe in his judicial capacity is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification") (citation omitted); *United States v. Pollard*, 295 U.S. App. D.C. 7, 959 F.2d 1011, 1031 (D.C. Cir. 1992) (district court "did not need to recuse itself under § 455(b)(1), because only personal knowledge of disputed evidentiary facts gained in an extrajudicial capacity is grounds for recusal, and any

knowledge [the district judge] had concerning the government's sentencing submissions came directly from his participation in the case").

I turn to petitioners' specific claims in the order in which they are enumerated above. Petitioners claim first that my awareness of Joel Winograd's previous disbarment and reinstatement triggered an obligation to inquire further concerning his potential conflict of interest in representing Bisaccia. Petitioners also speculate that I was aware of other facts concerning then-pending criminal investigations in which Winograd was a target. Petitioners' speculation patently does not provide a basis for a finding of my partiality. A motion for recusal must be supported by facts, "providing what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

The fact here adduced is that I was aware of Winograd's prior suspension from practice in an unrelated disciplinary proceeding. The question is whether this fact, standing alone, entailed an obligation to inquire about Winograd's conflict of interest. *See United States v. Stantini*, 85 F.3d 9, 13 (2d Cir. 1996) ("the trial court has an obligation to inquire into the facts and circumstances of an attorney's interests either in response to a timely conflict of interest objection, . . . or when it knows or reasonably should know of the possibility of a conflict of interest"). It is plain, just by the posing of the question, that it did not. There was no objective reason then, and none is advanced now, even

to suppose that the simple fact of Winograd's prior suspension, in a matter completely unrelated to the prosecution of Bisaccia, involved Winograd in a conflict of interest in representing Bisaccia. It follows that an informed observer, knowing that the Court's knowledge of the matter did not trigger a duty of inquiry, would not be moved to conclude that the Court might be biased in assessing Bisaccia's claims here. *See Liteky*, 510 U.S. at 548 (the recusal determination under § 455(a) is to be made "on all objective bases, so that what matters is not the reality of bias or prejudice, but its appearance") (emphasis in the original). Moreover, because the issue is in no way relevant to the disposition of those claims, it is difficult to see how any question is raised under § 455(b).

Petitioners' second claim is an attempt to revive an argument already rejected by this Court in the disposition of their Rule 33 motions, subsequently affirmed by the Second Circuit.[3] Bisaccia now claims that my purported duty to inquire about Carnesi's conflict of interest due to his representation of both Stantini and Mannino was triggered even earlier than Agent Petrouskie's testimony, in the course of the government's re-direct examination of Gravano, by Gravano's confirmation that the Oliveri murder was a

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[3]For this reason, petitioners are barred from obtaining relief in the nature of habeas corpus upon it. *See Douglas v. United* States, 13 F.3d 43, 46 (2d Cir. 1993) ("a movant cannot raise as a basis for vacating her sentence a ground raised in a previous § 2255 motion that was decided on the merits"). Because the claim bears directly on claims raised in the underlying § 2255 motions, however, the merits are briefly aired

charged count in a pending Southern District prosecution against Mannino. (Bisaccia Mem. of Law in Support of § 2255 Mot. at 5-7.) But even if I had the kind of pinpoint recollection of collateral detail with which petitioners insist I should be credited, if only constructively, it would still not affect the Second Circuit's determination that I received no indication from any party that Carnesi was representing Mannino in the Southern District prosecution until the motions for a new trial. *See United States v. Stantini*, 85 F.3d at 14. As the Second Circuit correctly observed, the "only issues raised by Carnesi during trial were the mention of his presence at the meeting [in the Southern District U.S. Attorney's Office, with Jerry Farrell, a witness to the scene of the Oliveri murder] and his possible inability to cross-examine Agent Petrouskie about what had transpired." *Id.* Even if it be assumed that I was also aware, or should have been, that the Oliveri murder was a charged count of the Southern District proceeding, I still had no reason to believe that Carnesi was counsel of record to both Stantini and Mannino. In any event, even conceding that I did or should have had such reason, petitioners say nothing to impugn the Court's additional observation that "it was not reasonably apparent how [knowing that Carnesi was representing both Stantini and Mannino] would indicate any obvious divergence of interest with respect to defense strategies, much less the diametrically opposed positions that the attorney had to take in *Ciak v. United States*, 59 F.3d 296 (2d Cir. 1995)." 85 F.3d at 15 (citation edited). It follows that no new issue is raised with respect to which I would be a

material witness in these proceedings, and thus, recusal is not mandated under § 455(b).

Petitioners claim that I was privy to a plea agreement between the government and Gravano, which, they allege, contained a provision assuring Gravano that "he would not likely have to testify against any of his crew," and also privy to the government's illegal suppression of that provision. (BM 2-3.) Once again, petitioners rely solely on speculation, this time spun from a passage of a book about Gravano that, even if credited, offers no factual basis for their claim. (This matter is addressed at greater length in Section III.A.3, below.) Once again then, petitioners' attempt to establish a factual predicate for recusal fails. *See In re United States*, 666 F.2d at 694 ("[A] judge . . . should not recuse himself on an unsupported, irrational, or highly tenuous speculation; were he . . . to do so, the price of maintaining purity of appearance would be the power of litigants . . . to exercise a negative power over the assignment of judges.").

Petitioners also claim that my familiarity with other cases related to theirs in which Gravano also testified or cooperated somehow constitutes knowledge from an "extrajudicial source," implicating § 455. But the cases have declined so narrowly to circumscribe the concept of an "extrajudicial source," for the perfectly sensible reason that, under such a concept, a judge would have to recuse himself from any case "related" to one he had presided over before. *See United States v. Parker*, 742 F.2d 127, 128 (4th Cir.), *cert. denied*, 469 U.S. 1076, 83 L. Ed. 2d 514, 105 S. Ct. 575 (1984) (familiarity

with facts stemming entirely from judicial conduct in presiding over earlier proceedings provides no basis for recusal); *United States v. Kasman*, 1993 U.S. Dist. LEXIS 10051, No. CR-93-339, 1993 WL 278440 at *4-6 (E.D. N.Y. July 20, 1993) (ILG) (discussing interplay between related-case and recusal doctrines).

Finally, petitioners offer suspicions that I knew of certain other, unspecified criminal acts by Gravano, but again, such suspicions must fail to raise an issue under § 455. Were it otherwise, "a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest factual bases for bias." *In re United States*, 666 F.2d at 695.

For the reasons set forth, the petitioners' motion for recusal pursuant to 28 U.S.C. § 455 is denied.

II. The Petitioners' Motions for Discovery and for an Evidentiary Hearing

Petitioners move for discovery under Rule 6(a) of the Rules Governing Section 2255 Proceedings, and for an evidentiary hearing on their claims. Rule 6(a) permits discovery "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." The Supreme Court has characterized Rule 6(a)'s "good cause" standard in terms that require a prior assessment of the petitioner's allegations:

> 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry.'

Bracy v. Gramley, 520 U.S. 899, 908, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 299, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969)). Thus the question for this Court is whether the petitioners' allegations reasonably permit inferences that, if credited, would entitle one or the other of them to relief under § 2255. If the answer is yes, then they should be afforded discovery for the purpose of further drawing out those allegations.

In fact, the answer is no: as will be more fully developed below, this Court concludes that the petitioners have done little more in their voluminous submissions on these motions than offer speculative variations on the ineffective assistance claims already specifically addressed and rejected by both this Court and the Court of Appeals. Even on the assumption that none of their claims is procedurally defaulted, and that all must be evaluated on the merits, the claims simply fail to raise any inference suggesting that § 2255 relief is indicated. Stantini's papers dwell on two new themes: that the proceedings in which Futerfas represented Stantini on a Rule 33 attack must be considered a nullity because of an alleged conflict of interest deriving from Futerfas's representations before Judge

Leisure in the Mannino trial on behalf of Carnesi; and that Carnesi was so preoccupied with fear of a government investigation that had ended well before the Mannino trial, and so divided in his loyalty to Stantini by the fact of certain prior representations and associations, that he was incapable of rendering effective assistance to Stantini. Stantini also revives and expatiates anew upon claims already advanced in the Rule 33 proceedings that he was denied an opportunity to plead guilty due to ineffective assistance by Carnesi, that the government committed *Brady* violations that require reversal, and that Carnesi's divided loyalty resulted in strategic choices that fatally prejudiced Stantini at trial.

For his part, Bisaccia is mostly content simply to recycle claims of his trial counsel's ineffectiveness already rejected by the Second Circuit. Bisaccia's claims particularly focus on the allegedly prejudicial effect of Winograd's prior disciplinary and criminal record, but, for reasons already in the public record of his case, fail to raise a colorable case for relief under § 2255. To the extent that he raises new claims, and assuming once again that he is not procedurally barred from doing so, those claims are also infirm (taking the form primarily of allegations of *Brady* violations raising no reasonable inference of a constitutional violation meriting § 2255 relief).

Section 2255 petitioners are not entitled to an evidentiary hearing as a matter of right, and the record upon which § 2255 motions are decided may be expanded by the addition of affidavits and

documentary exhibits as it has been here, without thereby necessitating such a hearing.[4] *See Blackledge v. Allison*, 431 U.S. 63, 81, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977) (a "district judge . . . may employ a variety of measures in an effort to avoid the need for an evidentiary hearing"); *United States v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir. 1988) (noting that "courts may use discovery or documentary evidence to expand the record . . . [as well as] . . . their own notes and recollections . . . [and their] common sense"). Where, as is also true here, the record conclusively shows that a petitioner seeks discovery and a hearing for the sole purpose of re-litigating claims already decided against him, claims he is procedurally barred from raising, or new claims that raise no reasonable inference that § 2255 relief should be granted, the proper course is to determine the motion on the record, without further unnecessary expenditure of judicial resources. Accordingly, petitioners' motion for discovery and for an evidentiary hearing is denied.

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[4]28 U.S.C. § 2255 provides: "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

III. The Petitioners' Substantive Claims Under 28 U.S.C. § 2255 [5]

A. Stantini's Claims

Stantini's primary claims are two-fold: that, because of various conflicts of interest that were concealed from him, the assistance he received from both Carnesi as his trial counsel, and Futerfas as his counsel on the Rule 33 motion and its appeal, was constitutionally ineffective; and that the government concealed or failed to disclose evidence material to his defense at trial, in violation of his rights and the government's obligations under *Brady v. Maryland* and its progeny.

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[5]For the most part the claims of Stantini and Bisaccia are considered on their merits, without discussion of the government's claims of procedural default. The justification for this approach is two-fold. First, both petitioners rely substantially on claims of ineffective assistance of counsel. It is true that *Billy-Eko v. United States*, 8 F.3d 111, 114-16 (2d Cir. 1993) carved out a narrow limitation to the general rule that claims of ineffective assistance should not be subject to a procedural bar when brought in the first instance in § 2255 proceedings, and it is true too that some of petitioners' claims arguably fall within the scope of that limitation. (Indeed, at least one of them unquestionably does, and is dealt with accordingly. *See* section III.2.a, *infra*.) But the procedural default issues here are sufficiently close that it is appropriate to address the merits. The second reason for caution in the assessment of the government's claims of procedural default has to do with the petitioners' claims of ineffective assistance of appellate counsel. These claims are obviously not barred on procedural grounds. But once assessed in argument on the merits, the Court is led logically to the merits of other new claims that have been adduced in connection with them (as will become more apparent in the discussion that follows).

These two broadly stated claims disperse into a host of more specific allegations across the expanse of Stantini's papers:

> (i) Carnesi was represented before Judge Leisure in proceedings bearing on his ability to provide conflict-free representation to Mannino by Futerfas, Stantini's counsel on the Rule 33 motion and appeal. Notwithstanding that Carnesi was ultimately reinstated as Mannino's counsel, Futerfas's ability to provide effective assistance to Stantini on his claim that Carnesi had provided ineffective assistance at his own trial was fatally compromised by his continuing duty of loyalty to Carnesi. (Stantini Reply Mem. at 8-11, 29-30; Stantini Supp. Reply Mem. at 15-18.)
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> (ii) Futerfas also "actively represented" Mannino in the Southern District trial before Judge Leisure, during the period of Carnesi's temporary disqualification from that case, again rendering him incapable later of providing effective assistance to Stantini. (Stantini Reply Mem. at 11-13, 29-30; Stantini Supp. Reply Mem. at 19-21.)
>
> (iii) Because of his divided loyalties to Manino, Carnesi "did all that he could to avoid having Stantini enter into a" plea agreement that the government had made available, thus rendering constitutionally

ineffective assistance to Stantini. (Stantini Reply Mem. at 19.)

(iv) Because he had been the target of a criminal investigation, Carnesi was deliberately less than zealous in his representation of Stantini, in an effort to "curry favor" with the government. (*Id.* at 24-25.)

(v) Because of divided loyalty to Erasmo Gambino, who was implicated in the crime, Carnesi declined an opportunity to impeach Gravano with evidence (turned over to the defense by the government in the Mannino trial) of his participation in a murder with which he was never charged by the government. (*Id.* at 25-28.)

(vi) The government suppressed a secret agreement with Gravano that he "could choose not to testify against his crew," in an action that constitutes "a reversible *Brady* violation." (*Id.* at 31, 34-36.)

(vii) This Court committed reversible error in failing to make a timely inquiry into Carnesi's potential conflict of interest, a matter that should be revisited despite the Court of Appeals' express rejection of the argument because Futerfas's failure to raise it initially on the Rule 33 motion was due to his ineffective assistance. (*Id.* at 39-43.)

These claims are addressed in the order raised.

1. Futerfas's alleged conflicts

Stantini argues that Futerfas was so debilitated by conflicting loyalties, which so adversely affected his representation of Stantini on the Rule 33 motion and its appeal, that those proceedings should be considered a "nullity," and Stantini should, at a minimum, be returned to the position he occupied immediately post-verdict, and allowed to take a direct appeal. Stantini's counsel pursues this argument quite zealously in his papers, raining scorn both on the government's opposition, and on anyone else inclined to a view of the issues different from his own. Counsel's often intemperate tone is unfortunate, because in this instance his arguments fail to persuade, for reasons manifest under the law concerning conflicts of interest.

The Second Circuit set forth the controlling legal principles in its decision affirming denial of the Rule 33 motion:

> A claim that counsel is conflicted is in essence a claim of ineffective assistance of counsel. *Glasser v. United States*, 315 U.S. 60, 70, 86 L. Ed. 680, 62 S. Ct. 457 (1942). Generally, a defendant who claims ineffective assistance must show prejudice to prevail. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). However, when counsel is burdened with an actual, as opposed to a potential, conflict of interest, a "fairly rigid"

presumption of prejudice applies. *Id.* at 692. Nevertheless, "prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980)). "In the multiple representation context, an attorney has an actual, as opposed to a potential, conflict of interest when 'during the course of the representation, the defendants' interests . . . diverge with respect to a material factual or legal issue or to a course of action.'" *United States v. Fulton*, 5 F.3d 605, 609 (2d Cir.1993) (*quoting Cuyler*, 446 U.S. at 356 n. 3). Once a defendant has established that there is an actual conflict, he must show that "'a lapse of representation' . . . resulted from the conflict." *United States v. Iorizzo*, 786 F.2d 52, 58 (2d Cir. 1986) (*quoting Cuyler*, 446 U.S. at 349). To prove a lapse of representation, a defendant must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued" but was not and that "the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993) (*quoting* and adopting the test of *United States v. Gambino*,

> 864 F.2d 1064, 1071 (3d Cir.1988), *cert. denied*, 492 U.S. 906, 106 L. Ed. 2d 566, 109 S. Ct. 3215 (1989)), *cert. denied*, 511 U.S. 1022 (1994).

United States v. Stantini, 85 F.3d at 15-16 (citations edited). On the record of this case, Stantini cannot show either that Futerfas's loyalty to him was compromised, or, even assuming it had been, that Stantini's interests in the Rule 33 proceedings were adversely affected.

(a) The Alleged Conflict with Carnesi

It is apparent in the first place that Futerfas's prior "representation" of Carnesi was hardly what the "multiple representation" cases are concerned with. According to Futerfas, after learning that he was no longer the target of a criminal investigation, Carnesi sought his "counsel" in seeking reinstatement as Mannino's counsel of record. (Futerfas Aff. at P 4, Stantini's Corrected Reply Exh. 3.) Futerfas accordingly wrote a letter to Judge Leisure "on behalf of Mr. Carnesi that ultimately led to his reinstatement back into the case as trial counsel for Mr. Mannino." (*Id.*)

These activities fall far short of the constitutional benchmark for actual conflict of interest. In *Glasser v. United States*, for example, defense counsel refrained from cross-examining a prosecution witness whose testimony directly linked the defendant to the crime, and failed to object to the introduction of arguably inadmissible evidence. Both actions were plausibly traced to counsel's "desire to diminish the jury's

perception" of the guilt of a codefendant whom counsel was also representing. *Cuyler*, 446 U.S. at 349. The Supreme Court found that, as a result, Glasser had been denied his right to effective representation of counsel. *Glasser*, 315 U.S. at 76.

By contrast, the Second Circuit found no actual conflict in *United States v. Lovano*, 420 F.2d 769 (2d Cir.), *cert. denied*, 397 U.S. 1071, 25 L. Ed. 2d 694, 90 S. Ct. 1515 (1970). There, counsel had represented two defendants in the same trial, one who claimed entrapment, and another who denied the existence of the charged conspiracy. *Lovano*, 420 F.2d at 774. The Court declined to find an actual conflict of interest on the ground that the two defendants were alleged to have been involved "in completely different aspects of the conspiracy." *Id.*

Lovano makes clear that a defendant claiming ineffective assistance due to a conflict of interest must do more than "show only that counsel had faced a situation in which action or inaction that might benefit his client would work to the detriment of another interest that divided counsel's loyalty." *Wayne R. LaFave & Jerold H. Israel, Criminal Procedure* § 11.9 at 579-80 (2d ed. 1992) (emphasis supplied). *See Lovano*, 420 F.2d at 774 (rejecting as "mere speculation" defendants' contention on appeal that counsel had declined at trial to elicit testimony from a co-defendant who had already pleaded, on the ground the testimony "might, while assisting one of [the two defendants on trial], have had an adverse effect upon the other, or, though assisting both, might have had an adverse effect [on the

co-defendant who had pleaded]"). Yet, for all the storm and stress of his rhetoric, Stantini has, at most, shown no more than that. That is, he has shown that in representing Stantini on his claim of Carnesi's ineffectiveness, Futerfas could conceivably have felt a conflicting loyalty to Carnesi. This conflicting loyalty in turn rests on the slender thread of a letter on Carnesi's behalf, supporting his reinstatement as counsel of record in the Mannino trial. This showing falls well short of making even a prima facie case for Futerfas's "actual conflict."

In fact, even if it be assumed solely for the purpose of argument that Futerfas had an actual conflict of interest, Stantini cannot show an adverse effect on Futerfas's performance. Counsel for Stantini suggests derisively that Futerfas was merely "going through the motions" in the Rule 33 proceedings. (Stantini Supp. Reply Mem. at 17.) But the findings of the Second Circuit in *United States v. Stantini*, 85 F.3d 9 (2d Cir. 1996) are to the contrary. Futerfas vigorously pressed the argument that Carnesi's concurrent representation of Mannino resulted in an actual conflict, and also argued that this Court should have been aware of Carnesi's conflict, and failed to inquire into it. Those arguments were rejected, for reasons that need not be rehearsed once more here, but certainly the fact that they were cannot be attributed to Futerfas's deficient performance as Stantini's counsel. Indeed, Stantini's assertions are not to the contrary: for example, he accuses Futerfas of failing to secure a more damning affidavit from Carnesi, but that "failure" is Carnesi's

and stems, according to the averments of Stantini's counsel, from the fact that Carnesi "continues to put himself first." (Stantini Reply Mem. at 20.)

(b) The Alleged Mannino Conflict

Stantini also insists, no more plausibly, that Futerfas had an actual conflict due to his prior representation of Mannino, which resulted in ineffective assistance to Stantini due to its adverse effects on Futerfas's performance in the Rule 33 proceedings. Again, however, even assuming that Stantini can establish an actual conflict, he can point to nothing in Futerfas's performance rising to the level of a lapse in representation and deriving from his conflicting loyalty to Mannino.[6] Stantini cites Futerfas's failure to argue that Carnesi's temporary disqualification in Mannino raised a Cancilla-type conflict, but it is difficult to see what such a strategy could have availed Stantini in the absence of any suggestion that Carnesi's defense of Stantini could have "uncovered evidence or prompted testimony revealing his own crimes." *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984). Here, Carnesi was not exposed to prosecution, and knew that he

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[6]In fact, there is no showing in the record that Futerfas at any time "actively represented conflicting interests" in acting on behalf of Mannino and Stantini. *Cuyler*, 446 U.S. at 350. Stantini speculates that "had Futerfas been in a position to pursue Mannino's role and reveal what Mannino knew . . . he would have put on truthful evidence that Mannino had a key role in the Oliveri murder . . . and that Mr. Stantini was not at all involved . . . " (Stantini Supp. Reply Mem. at 20.) This is precisely the sort of speculation about possibilities untethered to facts that cannot sustain a showing of actual conflict. *Lovano*, 420 F.2d at 774.

would not be before the beginning of Stantini's trial. Thus, there is no analogy to defense counsel's circumstances in Cancilla, where the government's investigation commenced only after the defendant had been convicted, and where the Court of Appeals assumed for the purpose of the appeal that counsel had in fact engaged in criminal activity directly related to the defendant's charged conduct. *Id.* at 868.

Stantini also claims that Futerfas failed to press the conflict argument that he did raise with sufficient zeal, and he raises anew the claim that the Court committed reversible error in failing to obtain a *Curcio* waiver from Stantini at trial (this time in the guise of an argument that Futerfas was ineffective in failing to raise the *Curcio* point until the appeal of the Rule 33 motion). These contentions again fail to raise an inference of a lapse of representation in the Rule 33 proceedings -- the former for reasons already discussed above, and the latter for reasons are fully set forth below.

For the reasons stated, this Court concludes that Futerfas's representation of Stantini in the Rule 33 proceedings was not constitutionally ineffective, and thus, provides no basis for relief pursuant to 28 U.S.C. § 2255.

2. Carnesi's Alleged Conflicts

Stantini's allegations of Carnesi's ineffectiveness due to conflict of interest are three-fold: first, Stantini attempts to revive his claim, decided against him already by the Second Circuit, that Carnesi prevented

him from entering into a favorable plea agreement, because of his loyalty to Mannino; second, Carnesi, like Futerfas, represented Stantini under circumstances that mandate reversal under the rule of Cancilla; finally, Stantini offers a new claim of Carnesi's divided loyalty, based on certain Jencks and impeachment material made available by the government in the Mannino trial, which Stantini's counsel purports has hitherto been "concealed."

(a) Stantini's Desire to Plead Guilty

In his Rule 33 appeal, Stantini argued that Carnesi had failed to "fully represent [his] interests in plea negotiations because of his fears of the effect a Stantini guilty plea would have on Mannino in the Southern District case." *United States v. Stantini*, 85 F.3d at 16. Stantini supported this position with an affidavit from Futerfas, setting forth reasons (presumably upon information and belief) why Carnesi was "somewhat relieved by Mr. Stantini's initial negative reaction to the plea offer." *Id.* In response to this argument, and to the Futerfas affidavit purporting to sustain it, the Second Circuit wrote:

> The Futerfas affidavit was conspicuously silent in several respects: It offered Judge Glasser no assertion that (1) Carnesi did not make the statement to the government that Stantini was not interested in pleading guilty, (2) Carnesi misrepresented Stantini's position when he informed the government that Stantini was not interested in pleading guilty under any circumstances, (3) Carnesi

> in any way counseled Stantini inadequately with respect to the advantages or disadvantages of a plea or (4) Stantini was, or could have been, interested in accepting a plea under any set of circumstances. Either Stantini or Carnesi, or both, were in a position to make these assertions if they were true, but they failed to do so. Therefore, putting aside the issue of whether Carnesi labored under an actual conflict of interest, Stantini has not shown any lapse in representation. Although in theory pleading guilty was a plausible defense strategy that was not undertaken, Stantini has offered no evidence whatsoever that this strategy was not undertaken for any reason other than his own desire not to so plead. He has not indicated that there is any evidence that the strategy was forgone because of any conflicting interest of Carnesi. This is so regardless of what Carnesi's personal reaction may have been to Stantini's own position.

Id. at 16-17. Stantini now attempts to remedy the deficiencies of his earlier argument, with factual allegations tailored to the Second Circuit's specifications.[7]

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[7]For example, Stantini now says that "I never told Mr. Carnesi that I would not plead guilty under any circumstances; nor was that ever my position." (Second Stantini Aff. at P 15.)

Stantini's attempt to revive the allegation that Carnesi impeded his desire to enter into a plea agreement falls afoul of two settled principles of habeas corpus litigation. First, "[a] § 2255 motion may not relitigate issues that were raised and considered on direct appeal." *United States v. Perez*, 129 F.3d 255, 260 (2d Cir. 1997), *cert. denied*, 525 U.S. 953, 142 L. Ed. 2d 318, 119 S. Ct. 384 (1998). Stantini already raised his claim of Carnesi's ineffective handling of the plea negotiations in his appeal of the Rule 33 motion, which the Second Circuit deemed to be "a direct appeal of Stantini's conviction . . . ." *Stantini v. United States*, 140 F.3d 424, 427 (2d Cir. 1998).

"A defendant is also barred from raising claims in his § 2255 motion that he failed to raise on direct appeal unless he shows cause for the omission and prejudice resulting therefrom. . . . A defendant may raise such claims where the issues were not raised at all on direct appeal due to ineffective assistance of counsel." *Perez*, 129 F.3d at 260-61 (citations and internal quotations omitted). Even if Stantini's new allegations are deemed a new claim subject to cause-and-prejudice analysis, they must nevertheless fail, because, for the reasons already set forth, Stantini cannot show that he was accorded ineffective assistance by Futerfas on his Rule 33 appeal.

(b) Carnesi's Cancilla Conflict

Stantini's claim that Carnesi suffered from a Cancilla conflict fails for reasons already touched on. Stantini's argument is that because Carnesi had been the target of a federal criminal investigation in the

Southern District, had been disqualified as Mannino's trial counsel for a period of almost two years in the course of those proceedings, and had been overheard on certain tape recordings used as evidence in that case, he suffered from actual conflicts of interest that adversely affected his performance as Stantini's counsel.

Stantini particularly relies on *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994). But that case is unavailing to him, and indeed highlights why his showing falls short of the constitutional threshold for ineffectiveness due to conflict of interest. First, in Levy the Court found that the conflicted defense counsel's "colloquies with the District Court revealed that his desire to avoid being called as a witness made him willing to sacrifice or compromise certain trial strategies and defenses." *Levy*, 25 F.3d at 156. By contrast, Stantini is unable to explain how either Carnesi's testimony, or the tapes that had been introduced against Mannino, could have been material evidence going to any issue in Stantini's trial. Second, in Levy the conflicted attorney was facing pending criminal prosecution by the same office that was prosecuting the defendant. *Id.* Here, the investigation of Carnesi by a different office and with respect to a different prosecution had been terminated before the proceedings against Stantini had even begun. Likewise, Carnesi had been reinstated by Judge Leisure as counsel of record in Mannino before Stantini's trial.

Counsel to Stantini on this motion conjures a litany of alternative defense strategies forgone by Carnesi due

to his putative conflicts of interest. But, in the absence of a convincing showing of actual conflict, such speculation cannot carry the burden of establishing ineffectiveness. The Second Circuit has already specifically found that Carnesi's interests and Mannino's did not diverge with respect to Mannino's participation in Oliveri's murder, and also that Carnesi did not refuse to pursue a theory of Mannino's culpability at Stantini's trial due to his conflicting loyalty to Mannino. *United States v. Stantini*, 85 F.3d at 18. On the basis of these findings, the Second Circuit rejected the contention, pressed by Futerfas in the Rule 33 proceedings, that Carnesi deliberately avoided certain defense strategies due to conflicts of interest. There is no reason advanced on this § 2255 motion to disturb that conclusion.

(c) Carnesi's Divided Loyalty to Erasmo Gambino

With histrionic flourish quite out of proportion to the substantiality of the claim, Stantini finally advances a new theory of Carnesi's conflict of interest, the lynchpin of which is an FBI report made available to Carnesi as part of the impeachment material in the Mannino case. The report sets forth hearsay allegations from an inmate in a federal prison concerning Gravano's alleged involvement in the murder of one Pietro Inzerillo in 1980 or 1981, which was allegedly commissioned by Erasmo Gambino. (*See* Corrected Exhs. in Support of Stantini Reply Mem., Exh. 8.) Stantini claims that Carnesi declined the opportunity to use this material to impeach Gravano during his testimony against Stantini because Gambino was a

"friend/client/associate" who had never been charged in the Inzerillo murder. (Stantini Reply Mem. at 26.)

Notwithstanding the heated insistence to the contrary of Stantini's counsel, it is apparent that, even assuming that Carnesi had Gambino's interests in mind when representing Stantini, the most that was forgone was "an opportunity to cross examine Gravano about [one] more murder[]." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994). It is not disputed that Gravano would have denied involvement in the Inzerillo murder, and the evidence to the contrary would likely have been deemed inadmissible. *affd* Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence."). Even if the FBI report so impressive to Stantini's counsel had been admitted, and used as a means for impeaching Gravano, it would have had no effect on Gravano's credibility that is discernible to this Court. The report -- based entirely on hearsay twice removed from an unidentified source -- is unreliable and untrustworthy on its face, but even if it were not, it would certainly have been cumulative. The Second Circuit's observation in rejecting a claim of *Brady* violations based on material that included the same report is apposite:

> Gravano had already confessed to numerous crimes, including murders, and was subject to withering cross examination for those actions. The addition of a few

> more allegations would not have materially affected the defense's cross examination of him.

Id. at 949; *see also United States v. Gotti*, 171 F.R.D. 19, 52 (E.D. N.Y. 1997) ("'New evidence' which is merely cumulative or impeaching is not an adequate basis for the grant of a new trial."). In this instance, Stantini's "new" claim is in fact a very stale claim, no more persuasive now than it was eight years ago when first raised and rejected by both this court and the Second Circuit. *See United States v. Gotti*, No. 90 CR 1051 (E.D. N.Y. Oct. 29, 1992), *aff'd sub nom. United States v. Locascio*, 6 F.3d 924, 948-50 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994). Certainly Carnesi's "failure" to exploit the material at issue falls far short of showing that Carnesi's conduct at Stantini's trial fell below an objective standard of reasonableness, or otherwise prejudiced his defense. *Strickland*, 466 U.S. at 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052. Accordingly, this ground too fails as a predicate for § 2255 relief.

3. The Government's Alleged Brady Violation

Pointing to Peter Maas's Underboss, published in 1997, Stantini, joined by Bisaccia, claims that it is now clear that Gravano struck a "secret" deal with the government guaranteeing that he would not have to testify against his closest friends and associates in the Gambino organization, and then concealed that deal

from Stantini, in a violation of his rights under *Brady* that mandates reversal.[8]

At the risk of incurring the invective of Stantini's counsel -- who ridicules the government's opposition to this claim as "more disingenuous baloney," and as "an attempt to be cute regarding the government's disclosure obligation," (Stantini Reply Mem. at 34) -- this Court confesses difficulty in ascertaining the basis for the alleged *Brady* violation. The Maas biography does not refer, even obliquely, to any secret deal struck between Gravano and the government. It purports to describe Gravano's motive in seeking a conditional two-year limitation on his cooperation -- that he wished to "avoid, if possible," testifying against certain members of the Gambino organization. Of course such a limitation was incorporated into Gravano's plea agreement, which was approved by this Court, and made available by the government, in its entirety, to Stantini and Bisaccia pursuant to its obligations under *Brady* and its progeny. Stantini's counsel thinks that the Maas biography makes it "clear" that the plea

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[8]Stantini evidently has the following passage in mind, describing negotiations between Gravano and government prosecutors that resulted in Gravano's plea agreement: "[Gravano] did achieve two important points. One was a two-year cap on his availability as a government witness. Clearly he wanted to avoid, if possible, testifying against any of the loyal members of his old crew. A 'good faith' compromise was reached. If, through no fault of the government, a case it wished to prosecute had not been brought to trial before the two years were up, Sammy would cooperate. Otherwise, the decision to testify would be solely Sammy's." Peter Maas, Underboss: Sammy the Bull Gravano's Story of Life in the Mafia 192 (1997).

agreement embodied some sort of unarticulated guarantee to Gravano that he would never have to testify against his "crew." But what is really "clear" is that the Gravano plea agreement simply means what it says: that Gravano would remain available to testify in any case brought by the government within two years of his signing, as well as in any later-tried case that the government had been unable in good faith to bring to trial earlier. The agreement, including that provision, was turned over to Stantini and Bisaccia and was before the jury that convicted them both. There is no conceivable basis for a claim of *Brady* violation deriving from the government's handling of it.

(4) This Court's Failure to Inquire into Carnesi's Conflicts at Trial

Finally, Stantini raises again a claim already decided against him twice in the Rule 33 proceedings: that this Court committed reversible error in failing to inquire further concerning Carnesi's conflicts of interest. Stantini argues that in light of his showing of Futerfas's ineffectiveness as appellate counsel, he should be allowed to re-litigate this claim.

This claim has already been addressed above, in Section III.A.1, denying the motion for recusal. The sum of the matter is that Stantini has said nothing and pointed to no evidence mandating reconsideration of the Second Circuit's conclusion that my "failure" to inquire into Carnesi's putative conflicts may be ascribed primarily to the fact that they were not actually brought to my attention, and nothing had transpired in the trial that can reasonably be charged to

me as constructive notice. *United States v. Stantini*, 85 F.3d at 14-15. Taken together with Stantini's failure to show Futerfas's ineffectiveness as counsel on his Rule 33 appeal, the Second Circuit's findings estop Stantini's attempt to re-litigate this issue, under principles of procedural bar already discussed in connection with his attempt to re-litigate his claim regarding the forgone plea agreement. (*See supra* Section III.A.2.a.)

For the foregoing reasons, Stantini's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied.

B. Bisaccia's Claims

Bisaccia seeks to revive his claim that his trial counsel, Joel Winograd provided ineffective assistance on the ground that, like Carnesi, Winograd was subject to Cancilla-type conflicts of interest, inasmuch as he had previously been the subject of criminal investigations and proceedings, had been convicted of a felony and had been suspended from practice. Bisaccia also argues ineffective assistance of appellate counsel, pointing to portions of the trial transcript that should have been marshaled in support of his contention that this Court reasonably should have been aware of Carnesi's conflict of interest due to his representation of Mannino. Finally, Bisaccia advances various allegations of the government's *Brady* violations, including two that have already been

specifically rejected by this Court, and by the Second Circuit.[9]

1. Ineffective Assistance of Trial Counsel

In his Rule 33 motion and appeal, Bisaccia argued ineffective assistance of trial counsel on the basis of Winograd's failure to recognize and take action regarding Carnesi's conflict, and his decision to pursue a joint defense strategy with Carnesi. This claim was conclusively answered by the Second Circuit, applying the familiar standards of *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984):

> Bisaccia has failed to demonstrate any deficient performance on Winograd's part. There was virtually no reason to think that the dual representation would give rise to a conflict of interest that would in any way affect Bisaccia's case. Under these circumstances, Winograd's failure to move for Carnesi's disqualification or to bring the possible conflict to Judge Glasser's attention was not objectively unreasonable. Moreover, there was no deficiency with respect to Winograd's performance in plea negotiations or at trial. He had no control over the government's demand that both defendants agree to plead guilty or over Stantini's reaction to the plea offer.

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[9]By a letter to the Court dated November 24, 1999, Bisaccia's attorney also raises a claim of ineffective assistance of trial counsel based on trial counsel's alleged failure to investigate certain witnesses that he purports are exculpatory.

> Moreover, it was not unreasonable to adopt the trial strategy that Winograd did. Winograd attempted to impeach Gravano's credibility by calling attention to his criminal past, his exhortations to associates to lie when testifying under oath, and the benefits that Gravano stood to gain by helping convict other members of the Gambino family. He argued that the corroborating evidence against Bisaccia had no relationship to the murder. Most significantly, to the extent that Bisaccia now argues that Winograd adopted a defense strategy that refused to throw light on Mannino's guilt, Winograd brought out on cross-examination of Agent Petrouskie that Farrell had identified Mannino (rather than Bisaccia) as standing over the body at the scene. He also highlighted corroborating evidence against Mannino in his summation. Because Bisaccia has failed to raise a plausible ineffectiveness claim, there is no need for further factual development in the district court.

United States v. Stantini, 85 F.3d at 20. Bisaccia now seeks to revive his claim that Winograd was constitutionally ineffective by reference to disciplinary proceedings, a felony conviction, a history of psychiatric treatment, and criminal investigations that are all part of Winograd's checkered past. Specifically, Bisaccia claims that Winograd's troubled history

supports a finding of a Cancilla-type conflict of interest.

The Second Circuit, and one district court have specifically addressed all of the contentions concerning Winograd raised once more by Bisaccia on this motion. *See United States v. Aiello*, 900 F.2d 528 (2d Cir. 1990); *United States v. Grado*, 1996 U.S. App. LEXIS 28077, 1996 WL 626354 (2d Cir. Oct. 30, 1996) (unpublished opinion); *United States v. Aiello*, 1997 U.S. Dist. LEXIS 15588, 1997 WL 630184 (S.D. N.Y. Oct. 9, 1997), as amended 1997 U.S. Dist. LEXIS 15588, 1997 WL 716913 (S.D. N.Y. Nov. 12, 1997). As was the case both in Aiello and Grado, Winograd's alleged offenses were "totally unrelated" to the crimes for which Bisaccia was being tried. *Aiello*, 900 F.2d at 531. Likewise, the crimes, investigations, and potential investigations to which Bisaccia refers were, with one exception, entirely concluded by the time of Bisaccia's trial. The one exception involves an investigation that "the government could have initiated" into allegations that Winograd had improperly provided sealed FBI surveillance transcripts to a client around the time of Bisaccia's trial. But, as the Second Circuit observed in an unpublished opinion rejecting this very claim, "the defendant here cannot point to anything more than the possibility that the attorney could be prosecuted" -- insufficient on its face to create a conflict that impugns the verdict. *Grado*, 1996 WL 626354 at **4.

None of the incidents dredged up by Bisaccia shows that Winograd courted any risk of further exposing himself to government investigation or

suspicion by conducting a vigorous defense of Bisaccia -- which is precisely what the Second Circuit determined he did, in rejecting Bisaccia's contention of his ineffectiveness the first time around. Accordingly, Bisaccia's claim of Winograd's ineffectiveness must again fail.

2. Ineffective Assistance of Appellate Counsel

Bisaccia's claim that he was accorded ineffective assistance of appellate counsel is based on the claim that appellate counsel failed to call the Second Circuit's attention to testimony on the record of Bisaccia's trial that would have demonstrated conclusively that this Court committed plain error in failing to obtain a waiver from Bisaccia concerning Carnesi's conflict of interest due to the Mannino proceedings. The underlying claim has already been addressed and disposed of -- this Court had no objective reason to believe that Carnesi was counsel of record in Mannino until the issue was raised directly in the Rule 33 proceedings after Bisaccia's trial. The issue of whether, even if Carnesi's conflict could be shown, Bisaccia could demonstrate prejudice, was also addressed by the Second Circuit:

> Bisaccia's basic proposition is that if counsel for co-defendant A is burdened with an actual conflict of interest, co-defendant B can take advantage of this and obtain a new trial. However, there is no reason for us to consider the validity of this theory, which Bisaccia's appellate counsel conceded was "somewhat novel." We have determined

> that Stantini suffered no lapse of representation in plea negotiations from any conflict that Carnesi may have been laboring under, and that there was no divergence of interest between Stantini and Mannino with respect to trial strategy. Under the circumstances, Carnesi's conduct, regardless of any alleged conflict, could not have prejudicially affected Bisaccia.

United States v. Stantini, 85 F.3d at 19. It follows that Bisaccia's appellate counsel was not ineffective for failing to press the theory of Carnesi's putative conflict with sufficient diligence and zeal.

3. Bisaccia's Brady Claims and a Related Claim of Ineffective Assistance

Bisaccia, like Stantini, points to evidence of other criminal conduct by Gravano allegedly suppressed by the government in violation of its obligations under *Brady*. This claim fails here for the reasons already set forth above, and at much greater length in a body of case law Bisaccia does not even attempt to grapple with. *See, e.g., United States v. Locascio*, 6 F.3d at 948-50; *United States v. Gotti*, 171 F.R.D. at 48-53; *United States v. Gambino*, 835 F. Supp. 74, 85-96 (E.D. N.Y. 1993), *aff'd*, 59 F.3d 353, 363-67 (2d Cir. 1995), *cert. denied*, 517 U.S. 1187, 134 L. Ed. 2d 776, 116 S. Ct. 1671 (1997).

Bisaccia also raises claims of *Brady* violations stemming from the government's failure to turn over reports of FBI interviews with Annie Gonzalez, Anthony Rodriguez, and Jerry Farrell, alleged material

witnesses to the charged offenses, as well as its failure to disclose that Mannino's home had been searched in 1988, and that a gun had been seized pursuant to that search.

Bisaccia does not dispute that co-counsel to Winograd at trial, George Abdy, was aware of both Gonzalez and Farrell as potential witnesses, but declined to call them at trial. Thus, any information concerning what they might have told federal agents falls beyond the scope of *Brady*. *See United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988), *cert. denied*, 488 U.S. 1040, 102 L. Ed. 2d 988, 109 S. Ct. 864 (1989) (". . . *Brady* does not require the government to turn over exculpatory evidence if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.") (citation and internal quotation omitted).

Nor does Bisaccia dispute that Rodriguez was never interviewed by federal agents. (Rodriguez Aff. at P 12.) Rodriguez was apparently interviewed by detectives from the New York City Police Department, and Bisaccia does not deny having obtained copies of reports reflecting the NYPD interviews. (*Id.* at PP 7-11.) At any rate, Bisaccia's claim of a *Brady* violation relating to this material betrays the sort of "monolithic view of government which, if adopted, would condemn the prosecution of criminal cases to a state of paralysis." *United States v. Gambino*, 835 F. Supp. at 95.

The same must be said of the search of Mannino's home and the alleged seizure of a weapon there. Bisaccia does not allege, and there is not a shred of

evidence to suggest, that the government (which is to say, the office of the United States Attorney for the Eastern District of New York) was aware that a weapon had been seized from Mannino's home. But even if it had been, Bisaccia would be unable to show the materiality of such evidence to his claim of a *Brady* violation. The evidence at his trial showed that Mannino and Joseph Gambino had been responsible for securing the weapons to be used in Oliveri's murder, so the seizure in Mannino's home of a weapon that might have been used in the murder hardly tends to exculpate one of his co-conspirators. *See United States v. Stantini*, 85 F.3d at 12.

Bisaccia also claims that his trial counsel was ineffective for failure to investigate Rodriguez, Gonzalez, and Farrell as exculpatory witnesses. *See, e.g., Fuller v. Att'y General of the State of Alabama*, 36 F. Supp. 2d 1323, 1324 (N.D. Ala. 1999) (granting habeas petition where issue of petitioner's guilt had been "quite close" at trial, and where trial counsel had failed to conduct a "basic investigation and interview" of a witness who would have provided plausible corroboration of petitioner's testimony in his own behalf). The Second Circuit has already made clear why a determination by Bisaccia's trial counsel that Farrell would not be an effective exculpatory witness cannot be considered objectively unreasonable. According to Agent Petrouskie's testimony at Bisaccia's trial, Farrell had admitted that "he had lied to Agent Petrouskie when he told him during a prior interview that he saw two men standing over the dead body and

had identified those two men as Gravano and Mannino." *Stantini*, 85 F.3d at 14. With respect to Gonzalez, Bisaccia does not dispute that she would have testified that "she knows nothing about the crime," or that his trial counsel would have been unable to impeach her with hearsay statements to the contrary. (*See* Fischer Aff. P 2.) Likewise, Bisaccia does not dispute that Rodriguez has never claimed that he would be able to identify the white male he saw at the scene of the murder. (*See* Rodriguez Aff. at P 5.) It hardly appears that the decision of Bisaccia's trial counsel not to pursue a trial strategy relying on the testimony of either Gonzalez or Rodriguez was objectively unreasonable, much less prejudicial to Bisaccia. It follows that Bisaccia is unable to sustain a claim of ineffective assistance of trial counsel under Strickland.

Accordingly, Bisaccia's claims for § 2255 relief on the ground of *Brady* violations, and ineffectiveness of trial counsel due to failure to investigate exculpatory witnesses, must be denied.

CONCLUSION

From the vantage point of this Court, seeing yet another fruitless motion for collateral relief brought upon grounds that have been advanced before and rejected at every level of the federal judiciary, the reflections of Justice Harlan seem apposite:

> If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question

> litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Mackey v. United States, 401 U.S. 667, 691, 28 L. Ed. 2d 404, 91 S. Ct. 1160 (1971) (Harlan, J., concurring).

For the foregoing reasons, the motions of Orazio Stantini and Robert Bisaccia to disqualify this Court from further proceedings in this case, for discovery and an evidentiary hearing, and to vacate, set aside, or correct their sentences pursuant to 28 U.S.C. § 2255 are denied in their entirety.

SO ORDERED.

Dated: April 12th, 2000

Brooklyn, New York

/s/ Leo Glasser, U.S.D.J.